Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of	)	
	)	
XO COMMUNICATIONS, INC.	)	
	)	**IB Docket 02-50**
for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act	)	

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: October 3, 2002 **Released: October 3, 2002**

By the Chief, International Bureau; Chief, Wireless Telecommunications Bureau; Chief, Wireline Competition Bureau

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant six applications for consent to transfer control of certain Commission licenses and authorizations held by XO Communications, Inc. ("XO") and its wholly-owned subsidiaries from Craig O. McCaw and the existing shareholders of XO to the new shareholders of XO. These shareholders will include, as 10 percent or greater shareholders, Forstmann Little & Co. Equity Partnership-VII, L.P. ("Forstmann Little Equity VII") and Forstmann Little & Co. Subordinated Debt and Equity Management Buyout Partnership-VIII, L.P. ("Forstmann Little MBO VIII" and, together with Forstmann Little Equity VII, "Forstmann Little"), and Teninver, S.A. de C.V. ("Teninver"), an indirect wholly-owned subsidiary of Teléfonos de México, S.A. de C.V. ("Telmex," and, together with Forstmann Little, the "New Shareholders"). We will refer collectively to all of these parties as the Applicants. The licenses and authorizations to be transferred include licenses and authorizations to provide domestic and international telecommunications services pursuant to parts 63, 90, and 101 of the Commission's rules.[1]

[1] *See* Applications of XO Communications, Inc. for Consent to Transfer Control, IB Docket No. 02-50 (filed February 21, 2002) (*Transfer Application*). The Transfer Application included the following six requisite filings: two applications to transfer control of international section 214 authorizations held by XO and XO Long Distance Services, Inc. ("XO Long Distance") (File Nos. ITC-T/C-20020221-00095; ITC-T/C-20020221-00096) (*International 214 Applications*); an application to transfer control of XO, XO Long Distance, and other XO subsidiaries as holders of blanket domestic section 214 authority (*Domestic 214 Application*); applications to transfer control of 91 Local Multipoint Distribution Service ("LMDS") licenses (FCC File No 0000753828) and ten 39 GHz licenses (FCC File No. 0000772528), all held by XO LMDS Holdings No. 1, Inc. ("XO LMDS"); and an application to transfer control of one Industrial/Business Pool, Conventional License, held by XO (FCC File No. 0000774240).

2. As discussed below, we conclude, pursuant to our review under sections 214(a) and 310(d) of the Communications Act of 1934, as amended (the "Communications Act" or "Act"),[2] that approval of the applications at issue, subject to conditions specified herein, will serve the public interest, convenience, and necessity. In addition, with respect to the application to transfer control of the LMDS and 39 GHz licenses held by XO LMDS, we conclude that the public interest would not be served by denying those applications because of proposed indirect foreign ownership of XO LMDS in excess of 25 percent.[3]

II. BACKGROUND

A. The Applicants

3. **XO.** XO is authorized, pursuant to section 214(a) of the Act, to provide local, domestic interstate, interexchange and international services. It also holds 91 LMDS and ten 39 GHz licenses[4] pursuant to section 308 of the Act.[5] XO is incorporated in Delaware and headquartered in Reston, Virginia. XO is currently controlled by Craig O. McCaw through his ownership interest in Eagle River Investments LLC, through other direct and indirect holdings of XO securities, and pursuant to various voting arrangements.[6] XO's Class A common stock currently trades on the OTC-Bulletin Board. According to the Applicants, XO is a full service provider of communication and information services to business customers.[7] XO delivers these services over its own network of metropolitan fiber rings and long haul fiber optic facilities and through the use of facilities and services leased or purchased from incumbent local exchange carriers.[8] Its network also includes fixed wireless licenses (LMDS and 39 GHz) covering 95 percent of the top U.S. business markets.[9]

4. **Forstmann Little.** Forstmann Little Equity VII and Forstmann Little MBO VIII are affiliated with Forstmann Little & Company, a private equity company that was formed in 1978. Both are Delaware limited partnerships. The general partner of Forstmann Little Equity VII is FLC XXXII Partnership, L.P., New York limited partnership, and the general partner of Forstmann Little MBO VIII is FLC XXXIII Partnership, L.P., also a New York limited partnership (together, the "Intermediate General Partners" or "Intermediate General Partnerships"). The Forstmann Little partnerships are part of a family of affiliated private investment funds. The general partners of each of the Intermediate General Partnerships are: Theodore J. Forstmann, Sandra J. Horace, Winston W. Hutchins, Thomas H. Lister, Jamie C. Nicholls, each of whom is a U.S. citizen, and Gordon A. Holmes, a citizen of the Republic of Ireland. As of the date of the applications, funds associated with Forstmann Little have made investments in XO, and in the aggregate hold approximately 22.4 percent of XO's outstanding shares of common stock, on a fully diluted, as-converted basis. Under the contemplated restructuring, these investments would be treated similarly to other existing equity holdings in XO. Forstmann Little funds also hold investments in two other FCC-regulated businesses, Citadel Communications Corporation and McLeod Incorporated.

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2 47 U.S.C. §§ 214(a), 310(d).

3 47 U.S.C. § 310(b)(4).

4 *See Transfer Application* at 4-5. *See also* supra note 1.

5 47 U.S.C. § 308.

6 *See Transfer Application* at 5 and Annex E.

7 *Id.* at 5.

8 *Id.* at 5-6.

9 *Id.* at 6.

5. **Telmex.** Telmex is a publicly traded Mexican corporation providing telecommunications services in Mexico through a 68,000-km fiber optic digital network.[10] According to the Applicants, the offerings of Telmex and its subsidiaries include a range of advanced telecommunications, data and video services, and Internet service for corporate customers.[11] Telmex is controlled by Carso Global Telecom, S.A. de C.V. ("CGT"), a Mexican holding company, which holds 31 percent of the stock of Telmex.[12] Approximately 67 percent of the shares of CGT are held in trust for investment purposes for Carlos Slim Helu and his family members, all of whom are Mexican citizens.[13] Telmex indirectly owns 100 percent of the capital stock of Teninver, the Mexican entity through which Telmex proposes to make its investment in XO.[14] Telmex's indirect, wholly-owned subsidiary, Telmex USA, L.L.C. ("Telmex USA"), is authorized, pursuant to section 214 of the Act, to provide international switched resale services in the United States.[15] Aside from Telmex USA, Applicants state that Telmex has no other FCC-regulated investments in the United States.

6. According to the Applicants, Telmex is affiliated under the Commission's rules with America Movil, S.A. de C.V. ("America Movil"). America Telecom, S.A. de C.V., a holding company sharing the same ownership as CGT, controls America Movil, a Mexican telecommunications company that provides wireless communications services in Mexico and has investments in Guatemala, Ecuador, Argentina, Brazil, Colombia, and Venezuela.[16] America Movil controls Telecomunicaciones de Guatemala ("Telgua"), a Guatemalan telecommunications company, and Techtel LMDS Comunicaciones Interactivas, S.A. ("Techtel"), a new Argentine competitor.[17] America Movil's U.S. investments include Tracfone Wireless, Inc. (a prepaid cellular reseller), Arbros Communications, Inc. (a provider of voice, data, and other telecommunications services to small and medium sized businesses and wholesale customers in the northeastern United States), and Comm South Companies, Inc. (a prepaid local wireline service provider controlled by Arbros).[18]

B. The Proposed Transaction

7. XO filed the transfer of control applications on February 21, 2002.[19] The Transfer Applications include a request for a declaratory ruling, pursuant to section 310(b)(4) of the Act, to allow

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10 *Id.* at 8.

11 *Id.*

12 *Id.*

13 *International 214 Application* at 4-5.

14 *Id. See also* Letter from Joan M. Griffin, Counsel for XO, to Marlene H. Dortch, Secretary, FCC, dated September 19, 2002 ("*XO September 19 Letter*") and *infra* para. 20.

15 See *Telmex/Sprint Communications, L.L.C. Application for Authority Under Section 214 of the Communications Act for Global Authority to Operate as an International Switched Resale Carrier Between the United States and International Points, Including Mexico*, Order, Authorization and Certificate, 12 FCC Rcd 17,551 (1997) (FCC File No. ITC-97-127). On June 30, 1999, the Commission granted consent to the transfer of control of Telmex/Sprint Communications, L.L.C. to Telmex International Ventures USA, Inc. ("*Telmex International Ventures*"). *See* International Authorizations Granted, Public Notice, DA 99-137 (rel. July 1999). By letter filed December 10, 1999, Telmex International Ventures advised the Commission that, pursuant to 47 C.F.R.§ 63.24, it had assigned the Section 214 authorization to its parent, Telmex International, Inc., and that pursuant to 47 C.F.R. § 63.21(i), Telmex USA, L.L.C., a wholly owned subsidiary of Telmex International, would use the authorization.

16 *See Transfer Application* at 9.

17 *Id.*

18 *Id.*

19 *See supra* n.1.

indirect foreign ownership of XO LMDS, XO's common carrier licensee, in excess of the 25 percent statutory benchmark for common carrier radio licensees. XO states that the proposed corporate restructuring is critical to the company's financial survival.[20] The Applicants intend to negotiate certain agreements and complete certain transactions with holders of XO senior notes and lending institutions under XO's secured credit facility that will result in XO having no more than $1 billion of senior secured debt in addition to other existing capital lease and secured obligations.[21] The restructuring contemplates the elimination of XO's existing stockholders' equity, including that of current controlling shareholder, Craig O. McCaw, and the prior investments by Forstmann Little funds[22] in exchange for a substantial infusion of capital from investors. To this end, XO proposes to issue new voting common shares to each of Telmex and Forstmann Little in exchange for $400 million in cash, for a total aggregate investment in XO of $800 million. XO states that upon consummation of the transaction, Forstmann Little and Telmex will each hold a non-controlling minority interest of approximately 40 percent in XO.[23] According to the Applicants, no single shareholder will control XO, and it is not anticipated that any other shareholder will hold more than a 10 percent interest in the company.[24]

8. Applicants assert that the transaction will produce significant public interest benefits, including greater competition in the provision of local telecommunications services.[25] XO asserts that the proposed transaction and the debt restructuring associated with it will provide critical funding for XO and a substantial reduction in its debt that will preserve and strengthen the company.[26] XO maintains that without additional funding, XO may be forced to decrease services and investment, and perhaps cease operations altogether.[27] XO also submits that the proposed transaction will have no adverse effect on competition in any of the telecommunications markets in which XO provides services.[28]

9. On March 11, 2002, the Commission sought comment on the proposed transaction.[29] RCN Corporation ("RCN"), a U.S. telecommunications company with operations in Mexico,[30] filed a petition to deny the XO applications.[31] RCN's petition to deny the Transfer Applications opposes grant of XO's

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20 *Transfer Application* at 3.

21 *Id.* at 10.

22 Funds affiliated with Forstmann Little have made investments in XO of $850 million in January 2000, $400 million in July 2000, and $250 million in the spring of 2001. As of the date of the applications, these Forstmann Little funds in the aggregate hold approximately 22.4 percent of XO's outstanding shares of common stock, on a fully-diluted, as-converted basis. Applicants state that under the contemplated restructuring, these investments will be treated similarly to other existing equity holdings in XO. *See Id.* at 7.

23 *Id.* at 2. Forstmann Little Equity VII proposes to hold 25 percent of XO's equity and voting stock, and Forstmann Little MBO VIII proposes to hold 15 percent of XO's equity and voting stock. *Id.* at 6.

24 *Id. See also infra* para. 20 n.61.

25 *Transfer Application* at 18.

26 *Id.* at 2-3.

27 *Id.* at 17.

28 *Id.* at 19.

29 Commission Seeks Comment on Applications for Consent to Transfer Control Filed by XO Communications, Inc., *Public Notice*, DA 02-579 (rel. Mar. 11, 2002).

30 RCN has invested in Megacable Comunicaciones de Mexico, S.A. de C.V. ("MCM Telecom"), a facilities-based local exchange carrier authorized to provide a variety of telecommunications services in Mexico. RCN owns approximately 40 percent of MCM Telecom, with the remainder ultimately owned by a group of Mexican investors. *See* RCN Petition to Deny Applications, filed April 22, 2002 ("*Petition*") at 2.

31 In addition to RCN's petition, we received approximately 130 informal comments from individual shareholders of XO. The comments, by and large, raise concerns about the value of their investment in light of the

requested foreign ownership ruling. RCN urges the Commission to deny the applications and the requested ruling or, at the very least, to condition any approval on Telmex not acquiring any interest in XO.[32] The gravamen of RCN's opposition is that Telmex, a foreign carrier, will use its market power in Mexico to harm competition in the U.S. market.

10. On June 17, 2002, XO voluntarily filed for bankruptcy under Chapter 11 of the Bankruptcy Code in order to effectuate the proposed transaction and the debt restructuring associated therewith.[33] XO filed with the Commission the requisite applications and notifications for the *pro forma* transfers or assignments of licenses and authorizations to XO as debtor-in-possession on June 19, 2002. On July 3, 2002, Applicants amended the pending transfer of control applications.[34] On August 26, 2002, the United States Bankruptcy Court for the Southern District of New York approved XO's third amended plan for reorganization, which, *inter alia*, approved the proposed investment by Forstmann Little and Telmex which is the subject of these applications.[35]

III. PUBLIC INTEREST ANALYSIS

A. Framework for Analysis

11. In considering the proposed transfer, the Commission must determine, pursuant to section 214(a) and section 310(d) of the Act, whether grant of the applications would serve the public interest, convenience, and necessity.[36] In addition, because of the foreign ownership interests presented in this case, we must also determine whether Forstmann Little's and Telmex's proposed ownership interests in XO licenses and authorizations is permissible under the foreign ownership provisions of section 310(b) of the Act.

12. The legal standards that govern our public interest analysis for transfers of control of licenses and authorizations under sections 214(a) and 310(d) require that we weigh the potential public interest harms against the potential public interest benefits to determine whether, on balance, the proposed transaction will serve the public interest, convenience, and necessity. Our analysis considers the likely competitive effects of the proposed transfer and whether such transfer raises significant anti-competitive issues.[37] In addition, we consider the efficiencies and other public interest benefits that are likely to result

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proposed transaction. We agree with XO that these types of concerns are more appropriately addressed in other fora, such as at the Securities and Exchange Commission or in shareholder lawsuits. *See Opposition* at 11. To the extent that these informal comments raise issues similar to RCN's petition, we incorporate them into our discussion.

32 *Petition* at 1.

33 *See* Letter from Joan M. Griffin, Counsel for XO, to Marlene H. Dortch, Secretary, FCC, dated June 17, 2002 ("*June 17 Letter*").

34 *See* Letter from Joan M. Griffin, Counsel for XO, to Marlene H. Dortch, Secretary, FCC, dated July 3, 2002 ("*July 3 Letter*"). XO is considering an alternative plan that would give ownership of the company to the bank creditors, who have loaned the company $1 billion. *See also* Letter from Wayne D. Johnsen and John F. Papandrea, Counsel for Forstmann Little, to Marlene H. Dortch, Secretary, FCC, dated August 29, 2002 ("*August 29 Forstmann Little Letter*") (questioning prospects for transaction proposed in pending applications). Our decision herein applies only to the transaction proposed in the pending applications, and does not prejudge FCC action on applications to effectuate this or any other alternative plan.

35 *XO Communications, Inc.*, Case No. 02-12947 (AJG) (Bankr. Ct. S.D.N.Y. Aug. 26, 2002).

36 47 U.S.C. §§ 214(a), 310(d).

37 *See, e.g., AT&T Corp., British Telecommunications, plc, VLT Co. L.L.C., Violet License Co. LLC and TNV [Bahamas] Limited*, Memorandum Opinion and Order, 14 FCC Rcd 19140, 19147 (1999) ("*AT&T/BT Order*").

from the transfer.[38] Further, we consider whether the proposal presents national security, law enforcement, foreign policy, or trade policy concerns.[39]

B. Qualifications of Applicants

13. As a threshold matter, we must determine whether the Applicants have the requisite qualifications to hold and transfer control of licenses under section 310(d) of the Act and the Commission's rules. In general, when evaluating transfer of control applications under section 310(d), we do not re-evaluate the qualifications of the transferor.[40] The exception to this rule occurs where issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing.[41] This is not the case here, and no issues have been raised that would require us to re-evaluate the basic qualifications of the transferor, XO Communications.

14. Section 310(d) of the Act requires that the Commission consider the qualifications of proposed transferees as if the transferees were applying for a license directly under section 308 of the Act.[42] We note that no party has challenged the basic qualifications of the transferee in this transaction, the reorganized XO Communications, and our independent review finds no evidence to suggest that the reorganized XO Communications or its proposed shareholders lack the requisite financial, technical, legal, or other basic qualifications.[43] Thus, we find that XO Communications, as reorganized, possesses the basic qualifications to be the transferee of the subject licenses and authorizations.

C. Foreign Ownership Review

15. In this section, we address issues relevant to our public interest inquiry under the foreign ownership provisions of section 310 of the Act. XO requests a ruling, pursuant to section 310(b)(4) of the Act, that it would not serve the public interest to prohibit indirect foreign ownership of its common carrier wireless subsidiary, XO LMDS, in excess of the statutory 25 percent foreign ownership benchmark by Telmex and a general partner of Forstmann Little, Gordon A. Holmes.[44] Specifically, XO requests that

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38 *See, e.g., Application of VoiceStream Wireless Corporation, Powertel, Inc. Transferors, and Deutsche Telekom AG, Transferee*, Memorandum Opinion and Order, 16 FCC Rcd 9779, 9789 (2001) ("*VoiceStream/Deutsche Telekom Order*").

39 *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23919-21 (1997) ("*Foreign Participation Order*"), Order on Reconsideration, 15 FCC Rcd 18158 (2000).

40 *See VoiceStream/Deutsche Telekom Order*, 16 FCC Rcd at 9790, para.19.

41 *Id. See also Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964); Stephen F. Sewell, Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934, 45 Fed. Comm. L.J. 277, 340 (1991) (explaining that the policy of not approving assignments or transfers of control when issues regarding the licensee's basic qualifications remain unresolved is intended to preserve the deterrent to licensee misconduct posed by the potential loss of the license through revocation or non-renewal, a deterrent that would be undermined if a licensee wrongdoer could assign or transfer the license with impunity).

42 Applicants for Commission licenses must set forth such facts as the Commission may require as to citizenship, character, and financial, technical, and other qualifications. *See* 47 U.S.C. § 308.

43 Although RCN alleges that Telmex has engaged in anticompetitive and discriminatory conduct, it does not challenge the basic character qualifications of the reorganized XO Communications on that or any other basis. We address elsewhere in this Memorandum Opinion, Order and Authorization RCN's argument that the application should be denied because Telmex's ownership interest in XO Communications would permit Telmex to further leverage its market power in Mexico to the detriment of competition on the U.S.-Mexico route. *See infra* para. 34.

44 *Transfer Application* at 2.

the ruling: (1) permit the requested indirect foreign ownership by Telmex and Mr. Holmes; and (2) allow XO LMDS to accept up to and including an additional, aggregate 25 percent indirect equity and/or voting interests from other unnamed foreign investors, except that no single foreign investor or entity, with the exception of Telmex and Mr. Holmes, may acquire indirect foreign ownership of XO in excess of 25 percent without Commission approval under section 310(b)(4).[45] In support of its requested ruling, XO asserts that the proposed investments by Telmex and Gordon A. Holmes in XO are attributable to World Trade Organization ("WTO") Member countries – Mexico and Ireland, respectively – and, therefore, XO is entitled to a rebuttable presumption that such interests do not raise competitive concerns.

16. Based on the record before us, we conclude that it would not serve the public interest to deny the applications to transfer control of the XO LMDS licenses because of the proposed foreign ownership of XO. We therefore grant XO's petition for declaratory ruling under section 310(b)(4) to the extent specified below.

17. Section 310(b)(4) of the Act establishes a 25 percent benchmark for indirect, attributable investment by foreign individuals, corporations, and governments in U.S. common carrier radio licensees, but grants the Commission discretion to allow higher levels of foreign ownership if it determines that such ownership is not inconsistent with the public interest.[46] The calculation of foreign ownership interests under section 310(b)(4) is a two-pronged analysis in which the Commission examines separately the equity interests and the voting interests in the licensee's parent.[47] The Commission calculates the equity interest of each foreign investor in the parent and then aggregates these interests to determine whether the sum of the foreign equity interests exceeds the statutory benchmark. Similarly, the Commission calculates the voting interest of each foreign investor in the parent and aggregates these voting interests.[48] The presence of aggregated alien equity or voting interests in a common carrier licensee's parent in excess of 25 percent triggers the applicability of section 310(b)(4)'s statutory benchmark.[49] Once the benchmark is triggered, section 310(b)(4) directs the Commission to determine whether the "'public interest will be served by the refusal or revocation of such license.'"[50] In its request, XO identifies proposed foreign ownership in XO that would exceed the 25 percent benchmark set by

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45 *Id.* at 2, n.2.

46 *See* 47 U.S.C. § 310(b)(4) (providing that "No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by ... (4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government, or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest would be served by the refusal or revocation of such license.").

47 *BBC License Subsidiary L.P.*, Memorandum Opinion and Order, 10 FCC Rcd 10968, 10973, para. 22 (1995).

48 *See id.* at 10972, para. 20.

49 *See, e.g., Sprint Corporation Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as amended,* Declaratory Ruling and Order, 11 FCC Rcd 1850, 1857, para. 47 (1995) ("*Sprint*"). *See also BBC License Subsidiary,* 10 FCC Rcd at 10972, para. 20; *Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended,* Declaratory Ruling, 103 FCC 2d 511, 520, para. 16, 523, para. 21 (1985) ("*Wilner & Scheiner I*"), *recon. in part,* 1 FCC Rcd 12 (1986) ("*Wilner & Scheiner II*").

50 *Sprint,* 11 FCC Rcd at 1857, para. 47 (quoting section 310(b)(4)). It is the licensee's obligation to inform the Commission before its indirect foreign ownership exceeds the 25 percent benchmark set forth in section 310(b)(4). *See Fox Television Stations, Inc.,* Order, 10 FCC Rcd 8452, 8474, para. 52 (1995).

section 310 (b)(4). We therefore must consider the proposed transfer of control of the XO LMDS common carrier licenses under this section of the Act.[51]

18. In the *Foreign Participation Order*, the Commission concluded that the public interest would be served by permitting greater investment by entities from WTO Member countries in U.S. common carrier and aeronautical fixed and *en route* radio licensees.[52] Therefore, with respect to indirect foreign investment from WTO Members, the Commission replaced its "effective competitive opportunities," or "ECO," test with the rebuttable presumption that such investment generally raises no competitive concerns.[53] With respect to non-WTO Member countries, the Commission continues to apply the ECO test in order to preserve the goals of: (i) promoting effective competition in the global market for communications services; (ii) preventing anti-competitive conduct in the provision of international services or facilities; and (iii) encouraging foreign governments to open their communications markets.[54] In evaluating an applicant's request for approval of foreign ownership interests under section 310(b)(4), the Commission uses a "principal place of business" test to determine the nationality or "home market" of foreign investors.[55]

19. In light of the policies adopted in the *Foreign Participation Order*, we begin our evaluation of XO's petition for declaratory ruling under section 310(b)(4) by calculating the proposed attributable, indirect foreign equity and voting interests in XO LMDS. We then determine whether these foreign interests properly are ascribed to individuals or entities whose home markets are WTO Member countries. The Commission has stated, in the *Foreign Participation Order*, that it will deny an application if we find that more than 25 percent of the ownership of an entity that controls a common carrier radio licensee is attributable to parties whose principal place(s) of business are in non-WTO Member countries that do not offer effective competitive opportunities to U.S. investors in the particular service sector in which the

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[51] Section 310(a) of the Act prohibits any radio license from being "granted to or held by" a foreign government or its representative. *See* 47 U.S.C. § 310(a). The ownership structure proposed by XO is such that no foreign government or representative will hold any of the XO LMDS common carrier licenses. Section 310(b)(1)-(2) of the Act prohibits common carrier, broadcast and aeronautical fixed or en route radio licenses from being "granted to or held by" aliens or their representatives, or foreign corporations. *See* 47 U.S.C. § 310(b)(1), (2). The ownership structure proposed by the Applicants is such that no alien or its representative, or foreign corporation will hold any of the XO LMDS licenses. Accordingly, we find that the proposed transaction is not inconsistent with the foreign ownership provisions of Section 310(a), (b)(1) and (b)(2) of the Act. *See VoiceStream/Deutsche Telekom Order*, 16 FCC Rcd at 9799-9800, paras. 38-48 (issues related to indirect foreign ownership of common carrier licensees addressed under section 310(b)(4)). Additionally, because the proposed transaction does not involve direct foreign investment in XO LMDS, it does not trigger section 310(b)(3) of the Act, which places a 20 percent limit on direct alien, foreign corporate or government ownership of entities that hold common carrier, broadcast and aeronautical fixed or en route Title III licenses. *See* 47 U.S.C. § 310(b)(3).

[52] *Foreign Participation Order*, 12 FCC Rcd at 23896, para. 9, 23913, para. 50, and 23940, paras. 111-12.

[53] *Id.* at 23896, para. 9, 23913, para. 50, 23940, paras. 111-12.

[54] *Id.* at 23894-95, para. 5.

[55] To determine a foreign entity's home market for purposes of the public interest determination under section 310(b)(4), the Commission will identify and balance the following factors: (1) the country of its incorporation, organization or charter; (2) the nationality of all investment principals, officers, and directors; (3) the country in which its world headquarters is located; (4) the country in which the majority of its intangible property, including production, transmission, billing, information, and control facilities, is located; and (5) the country from which it derives the greatest sales and revenues from its operations. *See Foreign Participation Order*, 12 FCC Rcd at 23941, para. 116 (citing *Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order, 11 FCC Rcd 3873, 3951, para. 207 (1995) ("*Foreign Carrier Entry Order*")).

applicant seeks to compete in the U.S. market, unless other public interest considerations outweigh that finding.[56]

20. In this case, the indirect foreign equity and voting interests in XO LMDS will be held through its corporate parent, XO. Following consummation of the transactions contemplated in the Stock Purchase Agreement (entered into between XO, Forstmann Little and Telmex), Telmex will hold approximately 40 percent of the equity and voting interests in XO indirectly through Teninver and an intermediate holding company, Controladora de Servicios de Telecommunicaciones, S.A. de C.V. ("Consertel").[57] Telmex, Teninver, and Consertel are foreign corporations organized under the laws of Mexico.[58] Forstmann Little also will hold approximately 40 percent of the equity and voting interests in XO.[59] Specifically, Forstmann Little Equity VII and Forstmann Little MBO VIII, both of which are domestically organized limited partnerships, will hold 25 percent and 15 percent of the shares of XO, respectively. The general partners of Forstmann Little Equity VII and Forstmann Little MBO VIII are themselves domestically organized limited partnerships: FLC XXXII Partnership, L.P. and FLC XXXIII Partnership, L.P., respectively. Gordon A. Holmes, a citizen of Ireland, is a general partner of each of these Intermediate General Partnerships. Forstmann Little states that foreign limited partners hold an aggregate interest of 11.32 percent in Forstmann Little Equity VII and 14.8 percent in Forstmann Little MBO VIII.[60] XO represents that neither Telmex nor Forstmann Little would have a controlling interest in XO.[61]

21. In *Wilner & Scheiner* and its progeny, the Commission set forth a standard for calculating both alien equity and voting interests held in a licensee, or, as here, in the licensee's parent, where such interests are held through intervening entities, including partnerships.[62] In calculating attributable alien equity interests in a parent company, the Commission uses a multiplier to dilute the percentage of each

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56 *Foreign Participation Order*, 12 FCC Rcd at 23946, para. 131.

57 *Transfer Application* at 11 and Annex F. *See also id.* at 12-15 (describing the voting rights of the Class C Common Stock to be issued to Telmex). According to XO, Consertel holds 99.99 percent of the common stock of Teninver, and Telmex holds 99.99 percent of the common stock of Consertel, which currently serves as an investment vehicle for Telmex. The remaining .01 percent of the common stock of each of Consertel and Teninver is held by other entities controlled by Telmex. *See XO September 19 Letter* at 1.

58 *Transfer Application* at 8; *XO September 19 Letter* at 1.

59 *Transfer Application* at 11 and Annex F. *See also id.* at 12-15 (describing the voting rights of the Class A and Class D Common Stock to be issued to Forstmann Little).

60 *See* Letter from Wayne D. Johnsen and John F. Papandrea, Counsel for Forstmann Little, to Marlene H. Dortch, Secretary, FCC, dated September 13, 2002 (*September 13 Forstmann Little Letter*).

61 *Transfer Application* at 2 and 12, and *supra* para. 7. While we are prepared to accept XO's assertion that neither Telmex nor Forstmann Little would have a controlling interest in XO, we would be concerned if Forstmann Little attempted to use provisions in XO's Amended and Restated Certificate of Incorporation to force any action through XO's Executive Committee, and to block review of that action by XO's Board of Directors, where the action has been opposed by Telmex's Investor Designee to the Executive Committee prior to the "Board Representation Date" specified in the certificate of incorporation. We would consider whether there had been an unauthorized transfer of control of XO in the event we received evidence of such conduct by Forstmann Little. *See* Amended and Restated Certificate of Incorporation of XO Communications, Inc. (appended as Exhibit D to that certain Stock Purchase Agreement, dated as of January 15, 2002, among XO, the Intermediate Partnerships and Telmex) at 7-10.

62 *See generally Wilner & Scheiner I*, 103 FCC 2d 511; *Wilner & Scheiner II*, 1 FCC Rcd 12; *BBC License Subsidiary*, 10 FCC Rcd at 10973-74, paras 22-25; *Amendment of Parts 20, 21, 22, 24, 26, 80, 87, 90, 100, and 101 of the Commission's Rules to Implement Section 403(k) of the Telecommunications Act of 1996*, Order, 11 FCC Rcd 13072 (1996) ("*Citizenship Requirements Order*").

investor's equity interest in the parent company when those interests are held through intervening companies. The multiplier is applied to each link in the vertical ownership chain, regardless of whether any particular link in the chain represents a controlling interest in the company positioned in the next lower tier.[63] Once the *pro rata* equity interests of each alien investor are calculated, these interests are then aggregated to determine whether the sum of the interests exceeds the statutory benchmark.[64]

22. By contrast, in calculating alien voting interests in a parent company, the multiplier is not applied to any link in the vertical ownership chain that constitutes a controlling interest in the company positioned in the next lower tier.[65] Similarly, where alien voting interests in a parent company are held through one or more intervening partnerships, the Commission does not apply the multiplier to dilute any general partnership interest or any limited partnership interest in a company positioned in the next lower tier of the vertical ownership chain, *unless* the licensee can demonstrate, in the case of a limited partner, that the partner effectively is insulated from active involvement in partnership affairs.[66]

23. We first calculate the attributable equity and voting interests in XO that would be held by Gordon A. Holmes, a citizen of Ireland. As discussed above, Mr. Holmes is a general partner of the Intermediate General Partnerships that serve as the general partners of Forstmann Little Equity VII and Forstmann Little MBO VIII, which collectively would acquire 40 percent of the equity and voting shares of XO. Applicants do not specify Mr. Holmes' partnership interests in either of the Intermediate General Partners (FLC XXXII Partnership, L.P. and FLC XXXIII Partnership, L.P.) but state generally that "Mr. Holmes' partnership interest in both FLC XXXII Partnership, L.P. and FLC XXXIII Partnership, L.P. is

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[63] For example, if foreign individuals or entities hold a 20 percent equity interest in Company A and Company A, in turn, holds a 40 percent equity interest in Company B, but has voting control of Company B, the percentage of Company B's equity capital supplied by Company A is 40 percent even if Company A controls Company B. The Commission has stated that, in these circumstances, "the percentage of that 40 percent equity capital reasonably attributable to aliens is proportionate to the alien contribution to Company A. The use of the multiplier (40% x 20% = 8%) properly discounts the alien participation in Company B." *BBC License Subsidiary*, 10 FCC Rcd at 10974, para. 25. *See also id.* at 10973-74, paras. 23-25 (overruling *Wilner & Scheiner II* insofar as it established a method of calculating alien equity ownership or contributed capital interests which directly tracked that used to determine alien voting interests).

[64] *BBC License Subsidiary*, 10 FCC Rcd at 10973-74, para. 25.

[65] Thus, in the example in note 63 above, the 20 percent foreign voting interest in Company A, which has voting control of Company B, would flow entirely to the next tier, and be attributed to Company B (100% x 20%). Counting all of Company A's foreign voting interest is appropriate, because, as the Commission has found, "actual control over the business ... is unlikely to be significantly attenuated through intervening companies." *Id.* at 10973, para. 23. *See also Wilner & Scheiner* I, 103 FCC 2d at 522, para. 19.

[66] That is, in the example in note 63 above, if Company A holds a general partnership interest or an uninsulated limited partnership interest in Company B, the 20 percent foreign voting interest in Company A would flow entirely to Company B (100% x 20%). *See Wilner & Scheiner* I, 103 FCC 2d at 522-23, paras. 20-21. *See also Vodafone Americas Asia Inc. (Transferor) and Globalstar Corporation (Transferee), Application for Authority to Transfer Control of Licenses and Section 214 Authorizations and Petition for Declaratory Ruling Allowing Indirect* Foreign Ownership, Order and Authorization,. DA 02-1557, (IB rel. July 1, 2002), at para. 26. 26. The Commission has stated that, while a licensee has flexibility in the manner in which it chooses to demonstrate insulation, an alien limited partner will be deemed to be effectively insulated from partnership affairs if the licensee can demonstrate that the alien limited partner conforms to the insulation criteria for exemption from attribution under the Commission's media cross-ownership rules. *Wilner & Scheiner I.* at 522, para. 20 n.50. The insulation criteria for limited partners under the cross-ownership rules are described in *Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, MM Docket No. 83-46, Memorandum Opinion and Order, FCC 85-252 (rel. June 24, 1985), *as modified on reconsideration* in MM Docket No. 83-46, *Memorandum Opinion and Order*, FCC 86-410 (rel. Nov. 28, 1986). *See, e.g.*, 47 C.F.R. § 21.912, Note 1 para. (g) (codifying the insulation criteria for purposes of attributing ownership and other interests in Multipoint Distribution Service licensees or cable television systems).

less than 20 percent."[67] They further state that FLC XXXII Partnership, L.P. holds a 2.56 percent interest in Forstmann Little Equity VII[68] and FLC XXXIII Partnership, L.P. holds a less than one percent interest in Forstmann Little MBO VIII.[69] In the absence of more precise information as to Mr. Holmes' interest in each of the Intermediate General Partners, we assume that his interest in each is 20 percent. Applying the Commission's attribution principles, we attribute to Mr. Holmes a 0.13 percent equity interest in XO through Forstmann Little Equity VII (.25 x .0256 x .20) and a 0.03 percent equity interest in XO through Forstmann Little MBO VIII (.15 x .01 x .20) for a total equity interest of 0.16 percent.

24. We attribute to Mr. Holmes a higher voting interest in XO due to his position as a general partner of the Intermediate General Partners of Forstmann Little Equity VII and Forstmann Little MBO VIII. The Applicants state for the record that, under the partnership agreements governing the Intermediate General Partnerships, the management of the business and affairs of those partnerships is vested exclusively in the partner designated as the Senior Partner, Theodore J. Forstmann. The Senior Partner has the right to delegate to any other general partner those of his duties and responsibilities as he sees fit in his sole discretion. No general partner may take any action to commit the partnership on any transaction without the approval of the Senior Partner.[70] Because the Senior Partner has the right to delegate his duties and responsibilities to any other general partner, however, we find that Mr. Holmes may, without prior Commission approval, exercise voting control over the Intermediate General Partnerships and, in turn, over the 40 percent voting interest in XO to be held by Forstmann Little Equity VII and Forstmann Little MBO VIII. We therefore attribute to Mr. Holmes a 40 percent voting interest in XO. Because Mr. Holmes is a citizen of Ireland, which is a WTO Member country, we presume that his 40 percent voting and 0.16 percent equity interests in XO raise no competitive concerns. Moreover, we are aware of no countervailing risk to competition in the U.S. market as a result of his interest in XO to rebut this presumption.

25. We next calculate the attributable equity and voting interests in XO that would be held by foreign limited partners of the Intermediate Partnerships. XO states that the aggregate percentages of equity and voting interests that would be held by foreign limited partners of Forstmann Little Equity VII and Forstmann Little MBO VIII are 11.32 percent and 14.8 percent, respectively.[71] In attributing equity interests, we apply the multiplier to dilute the percentage of the foreign limited partners' equity interests in Forstmann Little Equity VII and Forstmann Little MBO VIII by 25 percent and 15 percent, respectively (*i.e.*, the percentage of equity that each partnership would hold in XO). We attribute to XO an aggregate 5.05 percent foreign equity interest from the Forstmann Little limited partners.[72] We also

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67 *Transfer Application* at 21.

68 *Transfer Application* at 20-21. The percentage is based on capital contribution, which is the relevant measure of equity interests in a partnership. *See Wilner & Scheiner* I, 103 FCC 2d at 520, para. 16 n. 42, *recon. denied in pertinent part in Wilner & Scheiner II*, 1 FCC Rcd at 14, para. 17. FLC XXXII also has certain profit sharing incentives that reach 21.25 percent of partnership profits. *Transfer Application* at 21 n.24.

69 *Transfer Application* at 21. XO states that this ownership percentage is the same in terms of either capital contribution or share of profits. *See* Letter from Brad E. Mutschelknaus, and Joan M. Griffin, Counsel for XO, to Marlene H. Dortch, Secretary, FCC, dated May 9, 2002 ("*May 9 Letter*") at Attachment 1, n. 3.

70 *See May 9 Letter* at 7-8. Applicants also state that there is no formal management board. *Id.*

71 *See September 13 Forstmann Little Letter* at 2. Forstmann Little confirms that there are no foreign limited partnership interests in the Intermediate General Partnerships. *Id.* It also represents that the foreign limited partners have no voting rights, except in extraordinary circumstances (such as the retirement or incapacity of the general partner or any proposed amendment to the respective partnership agreement). In such situations, the voting rights are the same as the limited partner's percentage of the overall capital commitments of the partnership. *Id.*

72 We derive this percentage by calculating XO's attributable foreign limited partnership interests from Forstmann Little Equity VII (25% x 11.32% = 2.83%) and Forstmann Little MBO VIII (15% x 14.8% = 2.22%) and then aggregate these amounts for a total 5.05 percent equity interest.

attribute to XO a total 5.05 percent foreign voting interest from the Forstmann Little limited partners. In contrast to the rights of the Intermediate General Partnerships and their respective general partners, including Mr. Holmes, the foreign limited partners of Forstmann Little Equity VII and Forstmann Little MBO VIII are prohibited by the relevant partnership agreements from participating in the day-to-day management of the partnerships, and only the usual and customary investor protections are contained in each limited partnership agreement.[73] XO also represents that Forstmann Little's 40 percent interest in XO would not allow Forstmann Little to control the company.[74] We therefore apply the multiplier to dilute the voting interests held by the foreign limited partners in Forstmann Little Equity VII and Forstmann Little MBO VIII by 25 percent and 15 percent, respectively, for a total foreign voting interest of 5.05 percent.[75] XO does not identify for the record the citizenship or principal place of business of Forstmann Little's foreign limited partners.[76] Therefore, in contrast to our record findings that Mr. Holmes' attributable equity and voting interests in XO are properly ascribed to an investor from a WTO Member country, we make no such findings as to any Forstmann Little foreign limited partner. As a result, the foreign ownership ruling that we issue to XO would require that it count the unidentified 5.05 percent foreign equity and voting interests attributable to these limited partners as part of the additional, aggregate 25 percent foreign ownership amount that XO generally may accept from unnamed foreign investors without first seeking Commission approval.[77] XO may of course at any time in the future request a new foreign ownership ruling, properly substantiated, in the event it seeks to increase its foreign ownership above the level permitted under the ruling issued here.

26. We next calculate the attributable equity and voting interests in XO that Applicants state would be acquired by Telmex, a foreign corporation. We attribute a 40 percent equity and voting interest in XO to Telmex and to each of its subsidiaries through which Telmex would hold its investment in XO. We also find that Telmex has its principal place of business in Mexico, a WTO Member country. Applicants state that Telmex is organized under the laws of Mexico and has its headquarters in Colonia Cuauhtemoc, Mexico.[78] They represent that the majority of Telmex's officers and directors are Mexican citizens.[79] CGT, a Mexican corporation, holds approximately 31 percent of Telmex's total capital stock and controls the company. CGT is controlled by a trust for the benefit of Carlos Slim Helu and members of his immediate family, all of whom are Mexican citizens. Applicants state that there are no other ten

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73 *See September 13 Forstmann Little Letter* at 1-2.

74 *See supra* para. 20.

75 *See supra* para. 22.

76 *See* Letter from Wayne D. Johnsen and John F. Papandrea, Counsel for Forstmann Little, to Marlene H. Dortch, Secretary, FCC, dated September 19, 2002 (public version).

77 *See infra* para. 27. Generally, the section 310 (b)(4) rulings we issue to common carrier licensees under the *Foreign Participation Order* approve specific indirect equity and/or voting interests made by named foreign investors from WTO Member countries; and provide an allowance for an additional, aggregate 25 percent amount of unidentified foreign equity and/or voting interests, subject to certain limitations to ensure that no individual investor obtains an interest that exceeds 25 percent without prior Commission approval and that non-WTO Member investment does not exceed 25 percent. *See, e.g., Lockheed Martin Global Telecommunications, Comsat Corporation, and Comsat General Corporation, Assignor, and Telenor Satellite Mobile Services, Inc., and Telenor Satellite, Inc., Assignee,* Order and Authorization, 16 FCC Rcd 22897, 22913, para. 36 (2001), *erratum*, 17 FCC Rcd 2147 (IB 2002), *recon. denied,* FCC 02-207 (rel. July 12, 2002); *Application of General Electric Capital Corporation and SES Global S.A.*, Supplemental Order, 16 FCC Rcd 18878, 18884, para. 11 (IB & WTB 2001); *Motient Services Inc. and TMI Communications and Company, LP, Assignors, and Mobile Satellite Ventures Subsidiary LLC, Assignee,* Order and Authorization, 16 FCC Rcd 20469, 20477, para. 22 (IB 2001) ("*Motient Services Order*").

78 *Section 214 Transfer Application* at 3.

79 *See May 9 Letter* at 8-9 and Attachment 2.

percent or greater shareholders of Telmex's capital stock.[80] Applicants further represent that Telmex derives the majority of its sales revenue from, and maintains the majority of its tangible property in, Mexico.[81] Accordingly, we find that Telmex has its principal place of business in Mexico, a WTO Member country, and therefore is entitled to a rebuttable presumption that its proposed indirect ownership of XO does not pose a risk to competition in the U.S. market that would justify denial of the Transfer Applications. This presumption can be rebutted only if we find that grant of the applications would pose a very high risk to competition in the U.S. market, where our general safeguards and other conditions would be ineffective at preventing harm to U.S. consumers.[82]

27. As we explain more fully below, we find that RCN has not carried its burden to demonstrate that the Telmex investment would pose a very high risk to competition in the U.S. market.[83] Nor do we find other evidence in the record that would rebut this presumption. We therefore conclude that it will not serve the public interest to prohibit the proposed indirect foreign ownership of XO LMDS, XO's common carrier licensee. Specifically, this ruling permits XO LMDS to be owned indirectly by: Telmex, Teninver, and Consertel (collectively, the "Telmex Group") and by Telmex's Mexican shareholders, including CGT (up to and including 40 percent of the equity and voting interests); and Mr. Gordon A. Holmes (up to and including 0.16 percent of the equity and 40 percent of the voting interests). XO also may accept up to and including an additional, aggregate 25 percent indirect equity and/or voting interests from the above named foreign investors, or other foreign investors, without seeking further Commission approval under section 310(b)(4), subject to the following conditions: First, no single foreign investor, with the exception of the Telmex Group and its Mexican shareholders, including CGT, as well as Mr. Holmes (as to voting interests), may acquire an indirect equity or voting interest in XO LMDS in excess of 25 percent without prior Commission approval under section 310(b)(4). Second, XO LMDS shall seek approval under section 310(b)(4) before it accepts any additional indirect equity and/or voting interest from Telmex or CGT, or any additional voting interest from Mr. Holmes, other than that specifically approved here. Compliance with this ruling requires XO to count, as part of the additional, aggregate 25 percent foreign ownership amount, any foreign ownership not specifically identified in this ruling, including non-Mexican foreign ownership of Telmex, ownership by the Forstmann Little limited partners, and any foreign owners of the 20 percent of XO shares not being acquired by either the Telmex Group or Forstmann Little.

D. Competitive Effects

28. Our public interest analysis under sections 214(a) and 310(d) includes an evaluation of the competitive effects of the proposed transaction in the relevant product and geographic markets. For telecommunications service providers, the Commission has determined that the relevant product and geographic markets can include both U.S. domestic telecommunications service markets and telecommunications services between the United States and foreign points.[84] We determine that the

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80 *See Id.* at 10. Applicants note that SBC International, Inc., a U.S. corporation and subsidiary of SBC Communications, Inc., holds approximately eight percent of Telmex's total capital stock. They further state that: "While it is believed that the vast majority of the remaining shares are in the hands of U.S. citizens, there is no data available as to the citizenship of the remaining shareholders." *Id.*

81 *Id.* at 8.

82 *Foreign Participation Order* , 12 FCC Rcd at 23913-14, para. 51.

83 *See* Section III. E. *supra.*

84 With respect to domestic telecommunications services, the Commission separately analyzes the impact on competition in the product market for local exchange and exchange access services, and the product market for interexchange services. *See, e.g. Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control to MCI Communications Corporation of WorldCom, Inc.*, 13 FCC Rcd 18025, 18040 (1998) (*"MCI/WorldCom Order"*); *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation,*

proposed transfer will not likely result in harm to competition in any relevant market and will likely yield tangible public interest benefits.

29. We find that the instant case does not pose a threat of a reduction in the number of potential competitors in the geographic and product markets served by XO. Indeed, the Applicants submit that the investment of Forstmann Little and Telmex in XO will enable XO to continue to compete in the U.S. domestic and international telecommunications markets and that without the critical financing from Forstmann Little and Telmex, XO would cease to exist, thus decreasing the number of competitive local exchange carriers in the applicable markets.[85] The approval of the Applicants' restructuring insures that XO remains in the U.S. telecommunications market as a viable competitor.

30. In addition, no anticompetitive effects will result from this decision. Upon completion of the parties' restructuring plan, Forstmann Little will have interests in XO and two other communications companies, Citadel Communications Corporation and McLeod USA, Inc. Citadel does not provide telecommunications services. McLeod is a LEC in markets in which XO also operates. After investing $175 million as part of McLeod's financial restructuring plan, Forstmann Little became a 58 percent stake-holder in the company. In the case at hand, Forstmann Little and Telmex will each hold a non-controlling 40 percent share (80 percent total) in XO after the restructuring. Thus, Forstmann Little would not be in a position to control the operations of XO. Even if we assume that Forstmann Little would be able to control XO, any potential anticompetitive effects from combined operation of McLeod and XO would be diminished, as XO points out, by the fact that there are at least four other competitive LECs in addition to the incumbent local exchange carrier ("ILEC") in the states where XO and McLeod operate.[86] Furthermore, XO and McLeod also operate in the highly competitive U.S. domestic and international long distance and Internet markets targeting small and medium sized business users.[87] Thus, even assuming common control, it is highly unlikely that a combined entity would pose a threat to competition in the markets in which they operate. Instead, having XO and McLeod continuing to operate

(...continued from previous page)
Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, 15 FCC Rcd 14032, 14088-89 (2000) *("Bell Atlantic/GTE Order").* XO provides both types of services. *See May 9 Letter* at 3. The Commission further distinguishes between services provided to: (1) residential consumers and small business (mass market); and (2) medium-sized and large business customers (large business market). *Bell Atlantic/GTE Order,* 15 FCC Rcd at 14088-89. The Commission similarly has distinguished between international services provided to mass market and larger business market customers. *See MCI/WorldCom Order,* 13 FCC Rcd at 18095, para. 122. Because XO provides services to both "small" and "medium"-sized businesses, we conclude that it provides service to both types of customers that are relevant for the Commission's analysis. *See May 9 Letter* at 3.

85 XO is a full service provider of communication and information services to business customers throughout the United States. *Domestic 214 Application* at 3. XO delivers these services over its own network of metropolitan fiber rings and long haul fiber optic facilities, and through the use of facilities and services leased or purchased from incumbent local exchange carriers.

86 *May 9 Letter* at 6.

87 Based on total toll service revenues, AT&T, WorldCom and Sprint held a combined market share of approximately 64 percent for the year 2000. *See May 9 Letter* at 6 (citing Trends in Telephone Service, Industry Analysis Division, Com. Car. Bur., August 2001, at Table 10.9). *See also* Statistics of Communications Common Carriers, Industry Analysis Division, Wireline Competition Bur., September 2002, at Table 1.6 (indicating that based on total toll service revenues for long distance carriers for the year 2001, AT&T, WorldCom and Sprint also held a combined market share of approximately 64 percent).

as telecommunications service providers in all of these markets, even with an element of common ownership, furthers competition rather than curtailing it.[88]

E. Foreign Carrier Entry and Regulation

31. In the *Foreign Participation* Order, the Commission adopted an "open entry" standard with a rebuttable presumption that entry by carriers from WTO Member countries is in the public interest.[89] To overcome this presumption, it must be shown that entry by a foreign carrier will pose a very high risk to competition in the United States.[90] RCN has not shown that Telmex's facilities-based entry into the U.S. market through the purchase of XO will pose a very high risk to competition in the provision of U.S. international service. We find that our dominant carrier safeguards will protect sufficiently against any potential harms to U.S. customers on the routes where XO will be affiliated with the dominant carrier on the foreign-end of the route. Our conclusion takes into consideration whether, as a result of the transfer, XO would become affiliated with a foreign carrier that has market power on the foreign end of a U.S. international route that XO seeks to serve.[91]

32. Telmex is considered to be affiliated with America Movil, a Mexican telecommunications company that controls Telgua, the incumbent Guatemalan telecommunications company, and Techtel, a new Argentine competitor. XO agrees to be classified as a dominant carrier under section 63.10 on both the U.S.-Mexico and the U.S.-Guatemala routes.[92] We find no basis on this record to conclude that XO's affiliate in Argentina has market power on the foreign end of this route.[93] Accordingly, we find that, upon consummation of the proposed transfer of control of XO to the New Shareholders of XO, XO warrants classification as a non-dominant U.S. international carrier on all of its authorized U.S. international routes except on the U.S.-Mexico and U.S.-Guatemala routes, where it will be classified as dominant.

33. A carrier classified as dominant for the provision of international services on particular routes is subject to dominant carrier safeguards on those routes.[94] These safeguards are designed to address the possibility that a foreign carrier with control over facilities or services that are essential inputs for the provision of U.S. international services could discriminate against rivals of its U.S. affiliates (i.e., vertical

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88 Telmex also is affiliated with entities that provide or are authorized to provide U.S. domestic and international services in some or all of the same geographic markets as XO. *See supra* para. 6. *See also May 9 Letter* at 2. None of these entities, however, are significant participants in the U.S. domestic or international services market. *See May 9 Letter* at 3-4 (stating that Telmex USA currently does not provide telecommunications services in the United States; and calculating for XO and McLeod a 0.04 percent share and a 0.43 percent share, respectively, of total U.S.-billed international service revenues for the year 2000, both reporting on a switched resale basis only). We note that, even if we calculate XO's and McLeod's respective market shares as a percentage of switched resale revenues only, their shares are 0.08 and 0.87 percent, respectively. Thus, even assuming a combination of XO, McLeod and Telmex, it is highly unlikely that such a combination would result in a significant loss of competition in the markets in which they operate.

89 *Foreign Participation Order* 12 FCC Rcd at 23913, para. 50.

90 *Id.* at para. 51.

91 *See Foreign Participation Order,* 12 FCC Rcd at 23987, 23991-99, paras. 215, 221-39.

92 XO certifies that it will be affiliated within the meaning of 47 C.F.R. 63.09(e) with America Movil and Techtel. *International 214 Application* at 6.

93 Telmex's affiliate in Argentina, Techtel, is a new competitor in that market and is therefore not considered to possess market power in Argentina. The Commission has not imposed dominant carrier treatment on Telmex USA on the U.S.-Argentina route. *See* File No. FCN-NEW-20000908-00051.

94 47 C.F.R. § 63.10 (c) and (e).

harms).[95] RCN alleges that its inability to negotiate fair and effective local interconnection agreements with Telmex, inaction by Mexican regulators, arguably unjust local interconnection rates, and poor service quality are examples of Telmex's ability to discriminate.[96] While we are concerned about these allegations, we disagree with RCN's assertions that our dominant carrier safeguards and our enforcement authority would be ineffective to prevent any harm to U.S. competition that such alleged conduct might cause. The Commission has concluded that these safeguards, in conjunction with generally applicable international safeguards, are sufficient to protect against vertical harms by carriers from WTO countries in virtually all circumstances.[97]

34. RCN fails to establish a nexus between the alleged discriminatory conduct in Mexico and harm to competition in the United States.[98] RCN's reliance on the Notice of Apparent Liability ("NAL")[99] issued against Telmex USA[100] in 2000 as proof of Telmex's anticompetitive behavior is misplaced. The NAL was based on the alleged failure by Telmex USA to comply with a condition of its section 214 authorization and was cancelled without forfeiture.[101] Thus, it does not prove that Telmex has any propensity to engage in anticompetitive behavior. Nor does it serve as proof that Telmex would fail to comply with the Commission's competitive safeguards and other rules. Mere allegations that a foreign carrier or its U.S. affiliate has failed to abide by FCC rules and policies are not enough to justify the denial of that foreign carrier's application for entry into the U.S. telecommunications market.[102]

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95 In the *Foreign Participation Order*, the Commission concluded that these safeguards, in conjunction with generally applicable international safeguards, are sufficient to protect against vertical harms by carriers from WTO countries in virtually all circumstances. In the exceptional case where an application poses a very high risk to competition in the U.S. market, and where the standard safeguards and additional conditions would be ineffective, the Commission reserves the right to deny the application. *Foreign Participation Order*, 12 FCC Rcd at 23913-14, para. 51. In circumstances where an affiliated foreign carrier possesses market power in a non-WTO Member country, the Commission applies the ECO test as part of its public interest inquiry under section 214(a). *Id.* at 23944, para. 124.

96 RCN alleges that Telmex provides poor service quality, does not provide MCM Telecom with same level of service quality that it provides to itself and its affiliates, owes MCM several million dollars for undisputed interconnection compensation and that Mexican regulators (SCT & COFETEL) fail to adequately regulate Telmex. Petition at 3-5.

97 *See Foreign Participation Order,* 12 FCC Rcd at 23913-14, para. 51. Specifically, the Commission found that its regulatory safeguards and enforcement authority would be sufficient to detect and deter anticompetitive conduct by U.S.-authorized carriers and their foreign affiliates in WTO Member countries, regardless of the quality of their market opening commitments in the WTO or the extent of implementation of their commitments. *Id.* at 23907-10, paras. 37-42.

98 The Commission stated in the *Foreign Participation Order* that it would find denial warranted in circumstances where a carrier has the ability upon entry, or shortly thereafter, to raise prices by restricting output. The Commission also stated that it would consider an applicant's past behavior as an indication whether it would fail to comply with regulatory safeguards and whose behavior, as a result, could damage competition and otherwise negatively impact the public interest. In particular, the Commission stated it would consider whether a carrier has engaged in adjudicated violations of Commission rules, U.S. antitrust or other competition laws, or in demonstrated fraudulent or other criminal behavior. *Foreign Participation Order*, 12 FCC Rcd at 23915, para. 53.

99 *See Telmex International Ventures USA, Inc, Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 714 (Enforcement Bureau 2000), cancelled in Memorandum Opinion and Order, 16 FCC Rcd 14446 (Enforcement Bureau 2001).

100 Telmex USA, L.L.C. ("Telmex USA") is an indirect, wholly owned subsidiary of Telmex which holds an international section 214 authorization to provide international switched resale services in the United States. *See* n.15 *supra.*

101 *Id.*

102 *Foreign Participation Order* at 12 FCC Rcd at 23914-15, paras. 52-53. *See also supra* n.98.

Nevertheless, our decision to grant these applications should not be construed as condoning the conduct alleged by RCN. In any event, we retain the right to impose additional conditions on this transaction pursuant to section 63.21(g) should the demonstrated need arise.[103]

35. Finally, RCN argues that granting the XO applications may seriously undermine any leverage that the United States Trade Representative (USTR) could derive from them to achieve its trade policy goal of addressing anticompetitive activity in Mexico, especially as a WTO panel investigation of Mexico is pending.[104] In adopting its policies on foreign carrier participation in the U.S. telecommunications market, the Commission expressly rejected arguments that it should tie foreign carrier entry requirements to the extent to which a foreign country has implemented its market opening commitments under the WTO Basic Telecoms Agreement.[105] Moreover, the USTR has the ability to enforce a WTO Member country's commitments through the WTO dispute resolution process.[106] Hence, the WTO dispute resolution process provides the proper forum for redress. Appropriately, RCN has already petitioned the USTR to request that a WTO panel examine its claims that Telmex engages in anticompetitive conduct in violation of the WTO.[107] At the request of USTR, the Dispute Settlement Body of the WTO recently established a dispute settlement panel to examine U.S. claims regarding Mexico's compliance with its WTO Basic Telecoms Agreement commitments.[108]

F. National Security, Law Enforcement, Foreign Policy and Trade Policy Concerns

36. In acting on applications pursuant to sections 214 and 310 (b)(4), we also consider any national security, law enforcement, foreign policy, and trade concerns raised by the Executive Branch.[109] In this case, the Department of Justice ("DOJ") and the Federal Bureau of Investigation ("FBI") have advised the Commission that they have no objection to grant of the proposed applications provided that

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103 47 C.F.R. § 63.21(g).

104 *Petition* at 8-10.

105 See *Foreign Participation Order* para. 39.

106 *Id.* at paras. 39-41. For several years, the United States Trade Representative has had concerns with barriers to competition in Mexico's telecommunications market. On August 17, 2000, the United States requested consultations with Mexico regarding its commitments and obligations under the General Agreement on Trade in Services ("GATS") with respect to telecommunications services. According to the U.S. consultation request, the Government of Mexico has failed to (1) maintain effective discipline over dominant carrier, Telmex; (2) ensure timely, cost-oriented interconnection; and (3) permit alternatives to a system of charging U.S. carriers above-cost rates for completing international calls into Mexico. These consultations, which were held on October 10, 2000, did not resolve the dispute. Therefore, on November 10, 2000, USTR filed a request for the establishment of a dispute resolution panel as well as an additional request for consultations. Those consultations were held on January 16, 2001. At that time, the United States decided not to pursue its panel request further given progress achieved in Mexico's domestic telecommunications market. For instance, Mexico reduced domestic interconnection rates and introduced measures to regulate Telmex as a dominant carrier. However, based on the view that, Mexico has not addressed U.S. concerns regarding its international telecommunications regime, including rates that Telmex charges U.S. operators to complete calls into Mexico, on February 13, 2002, the United States filed a new request for a panel to examine these unresolved issues. The panel was established on April 17, 2002. *See* Office of United States Trade Representative, *WTO Dispute Settlement Regarding Telecommunications Trade Barriers in Mexico*, Docket No. WTO/DS-204, Notice and Request for Comments, 67 Fed. Reg. 20195 (2002).

107 *See* Petition at 4, Exhibit 1(*citing* Comments of MCM Telecom to the Office of the United States Trade Representative, dated December 13, 2000).

108 *See* Office of United States Trade Representative, *WTO Dispute Settlement Regarding Telecommunications Trade Barriers in Mexico*, Docket No. WTO/DS-204, *Notice and Request for Comments*, 67 Fed. Reg. 20195 (2002).

109 *Foreign Participation Order*, 12 FCC Rcd at 23918, para. 59.

the Commission condition the grant on compliance with the terms of an agreement between the DOJ, the FBI, and XO ("the XO/DOJ/FBI Agreement").

37. Specifically, on September 16, 2002, the DOJ and FBI filed a Petition to Adopt Conditions to Authorization and Licenses ("Petition to Adopt Conditions") that attaches the XO/DOJ/FBI Agreement.[110] The Petition to Adopt Conditions requests that the Commission condition grant of the instant applications on compliance with the terms of the XO/DOJ/FBI Agreement.

38. The XO/DOJ/FBI Agreement is intended to ensure that the DOJ, the FBI and other entities with responsibility for enforcing the law, protecting the national security and preserving public safety can proceed in a legal, secure and confidential manner to satisfy these responsibilities.[111] The XO/DOJ/FBI Agreement provides, *inter alia*, that XO shall (i) direct its officials, agents, and employees in the United States to comply with U.S. legal process;[112] (ii) make certain call and subscriber data available in the United States, if XO stores such data;[113] (iii) take reasonable measures to monitor the use of facilities used in domestic telecommunications (specifically with respect to personnel holding sensitive positions), information storage and access to foreign entities;[114] and (iv) not disclose domestic communications, transactional data, classified or sensitive information to any foreign government, agent, component or subdivision thereof without the express written consent of the Department of Justice or a court of competent jurisdiction.[115]

39. In assessing the public interest, we take into account the record and afford the appropriate level of deference to Executive Branch expertise on national security and law enforcement issues.[116] We recognize that, separate from our licensing process, XO has entered into the XO/DOJ/FBI Agreement, and that the Agreement expressly states that these agencies will not object to grant of the pending XO Transfer Applications, provided that the Commission conditions grant of the XO Transfer Applications on compliance with the Agreement.[117] The Executive Branch has not otherwise commented on this proceeding.

40. Therefore, in accordance with the request of the Department of Justice and the Federal Bureau of Investigation, in the absence of any objection from the Applicants, and given the discussion above, we condition our grant of the XO Transfer Applications on compliance with the XO/DOJ/FBI Agreement.

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110 *Department of Justice and Federal Bureau of Investigation*, Petition to Adopt Conditions to Authorizations and Licenses in the Matter of XO COMMUNICATIONS, INC; Applications for Consent to Transfer Control of a Company Holding Licenses and Authorizations Pursuant to Section 214 and 310(d) of the Communications Act and for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act (File Nos. ITC-T/C-20020221-00095; ITC-T/C-20020221-00096, FCC File No 0000753828, FCC File No. 0000772528, and FCC File No. 0000774240) (filed February 21, 2002) ("*Petition to Adopt Conditions*") (attaching the XO/DOJ/FBI Agreement).

111 *Petition to Adopt Conditions* at 4.

112 *XO/DOJ/FBI Agreement* at Article 2.3.

113 *Id.* at Art. 2.3.

114 *Id.* at Art. 2.6-3.12.

115 *Id.* at Art. 3.3-3.5.

116 *Foreign Participation Order*, 12 FCC Rcd at 23919-21, paras. 61-66.

117 XO/DOJ/FBI Agreement at 20, Article 7.1.

IV. CONCLUSION

41. Based on the foregoing findings, we conclude, pursuant to section 310(b)(4) and the Commission's "open entry" standard for indirect investment by WTO Members in U.S. common carrier licensees, that it will not serve the public interest to prohibit the proposed indirect foreign ownership of XO, which is in excess of 25 percent. Specifically, this ruling permits XO LMDS to be owned indirectly by: Telmex, Teninver, and Consertel (collectively, the "Telmex Group") and by Telmex's Mexican shareholders, including CGT (up to and including 40 percent of the equity and voting interests); and Mr. Gordon A. Holmes (up to and including 0.16 percent of the equity and 40 percent of the voting interests). XO also may accept up to and including an additional, aggregate 25 percent indirect equity and/or voting interests from the above named foreign investors, or other foreign investors, without seeking further Commission approval under section 310(b)(4), subject to the following conditions: First, no single foreign investor, with the exception of the Telmex Group and its Mexican shareholders, including CGT, as well as Mr. Holmes (as to voting interests), may acquire an indirect equity or voting interest in XO LMDS in excess of 25 percent without prior Commission approval under section 310(b)(4). Second, XO LMDS shall seek approval under section 310(b)(4) before it accepts any additional indirect equity and/or voting interest from Telmex or CGT, or any additional voting interest from Mr. Holmes, other than that specifically approved here. Compliance with this ruling requires XO to count, as part of the additional, aggregate 25 percent foreign ownership amount, any foreign ownership not specifically identified in this ruling, including non-Mexican foreign ownership of Telmex, ownership by the Forstmann Little limited partners, and any foreign owners of the 20 percent of XO shares not being acquired by either the Telmex Group or Forstmann Little.

42. We also conclude that the transfer of control is not likely to result in harm to competition in any relevant markets and will likely result in public interest benefits. The proposed reorganization plan in which the Applicants will increase their investment in XO will allow a large competitive LEC to remain as a valuable competitor and provider of telecommunications services. Accordingly, we approve the requested transfer of the domestic wireline section 214 authorization, the ninety-one LMDS licenses, the ten 39 GHz licenses, the international section 214 authorizations, and the Industrial/Business Pool Conventional License.

V. ORDERING CLAUSES

43. **IT IS ORDERED** that, pursuant to section 4(i) and (j), 214(a), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 154(j), 214(a), 309, and 310(d), the Applicants filed in the above-captioned proceeding ARE GRANTED to the extent specified in this Memorandum Opinion, Order and Authorization.

44. **IT IS FURTHER ORDERED** that, pursuant to section 310(b)(4) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(b)(4), the Petition for Declaratory Ruling filed by XO Communications, Inc. IS GRANTED to the extent specified in the Memorandum Opinion and Order.

45. **IT IS FURTHER ORDERED** that, pursuant to sections 4(i) and (j), 214(a) and (c), 309 and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), 214(a) and (c), 309, 310(b) and (d), that the Petition to Adopt Conditions to Authorization and Licenses filed by the Department of Justice and the Federal Bureau of Investigation, on September 16, 2002, IS GRANTED, and that the authorizations and licenses related thereto which are to be transferred as a result of this Memorandum Opinion, Order and Authorization are subject to compliance with provisions of the Agreement between XO Communications, Inc., on the one hand, and the Department of Justice and the Federal Bureau of Investigation on the other, effective on the date when the transfers have closed, which Agreement is designed to address national security, law enforcement, and public safety concerns of

the Department of Justice and the Federal Bureau of Investigation regarding the authority granted herein, is fully binding upon XO Communications, Inc. and those subsidiaries, successors and assigns of both companies that provide telecommunications services within the United States. Nothing in the Agreement is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, 47 U.S.C. §§ 222(a) and (c)(1) and the Commission's implementing regulations.

46. **IT IS FURTHER ORDERED** that, pursuant to section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, this authorization to XO Communications, Inc. to transfer control of their international section 214 authorizations to the New Shareholders of XO Communications, Inc. is subject to the condition that said section 214 authorizations shall be subject to rules governing dominant carriers set forth in section 63.10 of the Commission's rules, 47 C.F.R § 63.10, on the U.S.-Mexico, and U.S. Guatemala routes.

47. This *Memorandum Opinion and Order* is issued pursuant to section 0.261, 0.291 and 0.331 of the Commission's rules on delegated authority, 47 C.F.R §§ 0.261, 0.291, and 0.331 and is effective upon release. Petitions for reconsideration under section 1.106 or applications for review under section 1.115 of the Commission's rules, 47 C.F.R § 1.106, 1.115, may be filed within 30 days of the date of the release of this *Memorandum Opinion and Order*. *See* 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson, Chief
International Bureau

William F. Maher, Jr, Chief
Wireline Competition Bureau

Thomas J. Sugrue, Chief
Wireless Telecommunications Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
XO COMMUNICATIONS, INC.,	)	**IB Docket No. 02-50**
	)	
	)	
Application for Consent to Transfer of Control of a Company Holding Licenses and Authorizations Pursuant to Section 214 and 310(d) of the Communications Act and for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act	)	

To: The Commission

PETITION TO ADOPT CONDITIONS TO AUTHORIZATION AND LICENSES

The Department of Justice ("DOJ") and the Federal Bureau of Investigation ("FBI") respectfully submit this Petition to Adopt Conditions to Authorization and Licenses ("Petition"), pursuant to 47 C.F.R. § 1.41.

Through this Petition, the DOJ and the FBI hereby advise the Federal Communications Commission ("FCC" or "Commission") that the DOJ and the FBI have no objection to the FCC granting the relief requested in the applications filed in the above-referenced matter (herein referred to as "requested relief"), provided that the Commission conditions the grant of the requested relief on the compliance by XO Communications, Inc. ("XO") with the terms of the Agreement (attached hereto as Exhibit 1) reached between XO, the DOJ and the FBI.

XO, which is a corporation organized and existing under the laws of the State of Delaware, has filed with the Commission applications under sections 214 and 310(d) of the Communications Act of 1934, as amended (the "Act"), seeking consent to the transfer of control of XO from Craig O. McCaw and the existing shareholders of XO to the new shareholders of XO, which will include, as 10 percent or greater shareholders, Forstmann Little & Co. Equity Partnership-VII, L.P. ("Forstmann Little Equity VII"), Forstmann Little & Co. Subordinated Debt and Equity Management Buyout Partnership-VIII, L.P. ("Forstmann Little MBO VIII") (Forstmann Little Equity VII and Forstmann Little MBO VIII, collectively "Forstmann Little"), and an indirect wholly-owned subsidiary of Teléfonos de México, S.A. de C.V. ("Telmex"). XO has also requested a declaratory ruling pursuant to section 310(b)(4) that it will not serve the public interest to prohibit indirect foreign ownership of XO's wireless licenses in excess of the statutory 25 percent foreign ownership benchmark by Telmex and a general partner of Forstmann Little, Gordon A. Holmes.[1]

In its filings, XO represented that following consummation of the proposed transfers of control of the authorizations and licenses, Forstmann Little and Telmex will each hold a non-controlling minority interest of approximately 40 percent in XO. No single shareholder will control XO, and it is not anticipated that any other shareholder will hold more than a 10 percent interest in XO. XO also represented that Telmex has no foreign government ownership (direct or indirect) that is ten (10) percent or greater or of which XO is aware.

As the Commission is aware, the DOJ and the FBI have previously noted that their ability to satisfy their obligations to protect the national security, to enforce the laws and preserve the safety

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[1] Public Notice, IB Docket No. 02-50, DA 02-579 (rel. Mar. 11, 2002).

of the public can be significantly impaired by transactions in which foreign entities will own or operate a part of the U.S. communications system, or in which foreign-located facilities will be used to provide domestic communications services to U.S. customers. In such cases, the DOJ and the FBI have stated that foreign involvement in the provision of U.S. communications must not be permitted to impair the U.S. government's ability to satisfy its obligations to U.S. citizens to (1) carry out lawfully-authorized electronic surveillance of domestic U.S. calls or calls that originate or terminate in the United States; (2) prevent and detect foreign-based espionage and electronic surveillance of U.S. communications, which would jeopardize the security and privacy of such communications, and could foreclose prosecution of individuals involved in such activities; and (3) satisfy the National Security Emergency Preparedness Act and U.S. infrastructure protection requirements. To address these concerns, the DOJ and the FBI have negotiated agreements. The agreements reached in the past have been filed by stipulation among the parties with the Commission, and the Commission has conditioned its grant of approvals of the requested transfers of control on compliance with the terms of the agreements.[2]

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[2] *See, e.g.*, Memorandum Opinion and Order, *Merger of MCI Communications Corp. and British Telecommunications, plc,* 12 FCC Rcd 15,351 (1997) (agreement adopted by the Commission, but the merger did not take place); Memorandum Opinion and Order, *AirTouch Communications, Inc. and Vodafone Group, plc,* DA No. 99-1200, 1999 WL 413237 (rel. June 22, 1999); Memorandum Opinion and Order, *AT&T Corp., British Telecommunications, plc, VLT Co. L.L.C., Violet License Co., LLC and TNV [Bahamas],* 14 FCC Rcd (Oct. 29, 1999); Memorandum Opinion and Order, *Vodafone AirTouch PLC and Bell Atlantic Corp.,* DA No. 99-2415, 2000 WL 332670 (rel. Mar. 30, 2000); Memorandum Opinion and Order, *Aerial Communications, Inc. and VoiceStream Wireless Holding Corp.,* 15 FCC Rcd 10,089 (2000); Memorandum Opinion and Order, *DiGiPH PCS, Inc. and Eliska Wireless Ventures License Subsidiary I, L.L.C.,* No. 15639 (rel. Dec. 13, 2000); Memorandum Opinion and Order, *VoiceStream Wireless Corporation, Powertel, Inc., et al. and Deutsche Telekom AG,* IB Docket No. 00-187, 2001 WL 431689 (F.C.C.)(rel. April 27, 2001).

On April 18, 2002, XO advised the FBI that it was waiving its right to oppose late filings made in the above-captioned docket by the FBI or other Executive Branch agencies raising national security, law enforcement, or public safety concerns on the grounds that such filings are untimely. In addition, XO stated that it would consider in good faith entering into a joint petition with the FBI and other Executive Branch agencies that will ask the FCC to defer the grant of the applications pending a resolution of those aspects of the applications that the FBI and other Executive Branch agencies believe may raise potential national security, law enforcement, and public safety issues. The parties were at that time commencing negotiations to reach an agreement that would ensure that national security, law enforcement and public safety concerns are adequately addressed.

On September 16, 2002, the DOJ and the FBI entered into the Agreement with XO. The Agreement is intended to ensure that the DOJ, the FBI and other entities with responsibility for enforcing the law, protecting the national security and preserving public safety can proceed in a legal, secure and confidential manner to satisfy these responsibilities.

Accordingly, the DOJ and the FBI hereby advise the Commission that the DOJ and the FBI have no objection to the FCC granting the proposed transfers of control and related assignments of XO's licenses that are the subject of the applications filed with the FCC in IB Docket No. 02-50, provided that the Commission conditions the grant of approvals of the transfers of control, related assignments and authorizations on compliance with the terms of the Agreement between the DOJ, the FBI, and XO.

The DOJ and the FBI are authorized to state that XO does not object to the grant of this Petition.

Respectfully submitted,

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September 16, 2002

CERTIFICATE OF SERVICE

I, Myla R. Saldivar-Trotter, Federal Bureau of Investigation, hereby certify that on this 16th day of September, 2002, I caused a true and correct copy of the foregoing **PETITION TO ADOPT CONDITIONS TO AUTHORIZATION AND LICENSES** to be served via hand delivery (indicated by *) or by mail to the following parties:

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VA01/GRIFJ/36337.1

AGREEMENT

This AGREEMENT is made as of the date of the last signature affixed hereto, by and between XO Communications, Inc. ("XO"), on the one hand, and the Federal Bureau of Investigation ("FBI") and the U.S. Department of Justice ("DOJ"), on the other (referred to individually as a "Party" and collectively as the "Parties").

RECITALS

WHEREAS, U.S. communication systems are essential to the ability of the U.S. government to fulfill its responsibilities to the public to preserve the national security of the United States, to enforce the laws, and to maintain the safety of the public;

WHEREAS, the U.S. government has an obligation to the public to ensure that U.S. communications and related information are secure in order to protect the privacy of U.S. persons and to enforce the laws of the United States;

WHEREAS, it is critical to the well being of the nation and its citizens to maintain the viability, integrity, and security of the communications systems of the United States (*see e.g.*, Executive Order 13231, Critical Infrastructure Protection in the Information Age, and Presidential Decision Directive 63, Critical Infrastructure Protection);

WHEREAS, protection of Classified, Controlled Unclassified, and Sensitive Information is also critical to U.S. national security;

WHEREAS, XO has an obligation to protect from unauthorized disclosure the contents of wire and electronic communications;

WHEREAS, XO provides the following services: (1) Internet access services, including dedicated access services and DSL services; (2) private data networking services, including dedicated transmission capacity, virtual private network services, and Ethernet services; (3) hosting services, including web hosting, server collocation, and application hosting; (4) local and both domestic and international long distance voice services; (5) shared tenant services; (6) interactive voice response systems; and (7) integrated voice and data services;

WHEREAS, XO (or its affiliated entities) provides or facilitates electronic communication services, remote computing services, and interactive computing services in the United States, and certain of its customers (including, *inter alia*, Internet-related companies) are themselves providers of electronic communication services, remote computing services, and interactive computer services, all of which are subject to U.S. privacy and electronic surveillance laws;

WHEREAS, XO (or its affiliated entities) has direct physical or electronic access to certain customer facilities, including servers, storage media, network connections, bandwidth transport, and firewalls, and thereby has access to a variety of customer and end-user information that is subject to U.S. privacy and electronic surveillance laws;

WHEREAS, XO has entered into a Stock Purchase Agreement (the "Stock Purchase Agreement"), dated January 15, 2002, among XO, Forstmann Little & Co. Equity Partnership-VII, L.P. ("Forstmann Little Equity VII"), Forstmann Little & Co. Subordinated Debt and Equity Management Buyout Partnership-VIII, L.P. ("Forstmann Little MBO VIII") (Forstmann Little Equity VII and Forstmann Little MBO VIII, collectively "Forstmann Little"), and Teléfonos de México, S.A. de C.V. ("Telmex," and collectively with Forstmann Little, the "Investors");

WHEREAS, XO has filed with the Federal Communications Commission ("FCC") applications (in IB Docket No. 02-50) under Sections 214 and 310(d) of the Communications Act of 1934, as amended, seeking FCC approval of the transfer of control of XO, upon consummation of the transactions contemplated by and pursuant to the terms of the Stock Purchase Agreement, from Craig O. McCaw and the existing shareholders of XO to the new shareholders of XO, which will include, as 10 percent or greater shareholders, Teninver, S.A. de C.V. ("Teninver"), an indirect wholly-owned subsidiary of Telmex, and Forstmann Little;

WHEREAS, as disclosed to the FCC, Telmex is a publicly-traded Mexican corporation that (1) is controlled by Carso Global Telecom, S.A. de C.V., a Mexican holding company approximately 68 percent of the shares of which are held in trust for investment purposes for the benefit of Carlos Slim Helu and his family members, all of whom are Mexican citizens; and (2) has no foreign government ownership (direct or indirect) that is ten (10) percent or greater or of which XO is aware;

WHEREAS, following FCC grant of the applications in FCC IB Docket No. 02-50, and upon satisfaction of all other conditions set forth in, and consummation of the transactions contemplated by, the Stock Purchase Agreement, Telmex (through Teninver) proposes to acquire a non-controlling minority interest of approximately 40% of the stock of XO;

WHEREAS, following FCC grant of the applications in FCC IB Docket No. 02-50, and upon satisfaction of all other conditions set forth in, and consummation of the transactions contemplated by, the Stock Purchase Agreement, Forstmann Little proposes to acquire a non-controlling minority interest of approximately 40% of the stock of XO;

WHEREAS, the FCC's grant of the applications in FCC IB Docket No. 02-50 may be made subject to conditions relating to national security, law enforcement, and public safety, and whereas XO has agreed to enter into this Agreement with the FBI and the DOJ to address issues raised by the FBI and the DOJ, and to request that the FCC condition the authorizations and licenses granted by the FCC on their compliance with this Agreement;

WHEREAS, by Executive Order 12661, the President, pursuant to Section 721 of the Defense Production Act, as amended, authorized the Committee on Foreign Investment in the United States ("CFIUS") to review, for national security purposes, foreign acquisitions of U.S. companies;

WHEREAS, XO and Telmex may submit a voluntary notice with CFIUS regarding Telmex's proposed investment in XO, and XO has entered into this Agreement to resolve any

national security issues that the DOJ and the FBI might raise, including in the CFIUS review process;

WHEREAS, representatives of XO and the Investors have met with representatives of the FBI and the DOJ to discuss issues raised by the FBI and the DOJ. In these meetings, XO represented that: (a) XO has no present plans, or is not aware of present plans of any other entity that would result in a Domestic Communications Company providing Domestic Communications or Hosting Services through facilities located outside the United States (though the Parties recognize that XO may, for *bona fide* commercial reasons as provided in this Agreement, use such facilities); and (b) Telmex has advised that Telmex is an entity whose commercial operations are wholly separate from the Mexican Government and whose activities are overseen by independent regulatory authorities in Mexico. Further, XO represented that it operates in extremely competitive markets and, to XO's knowledge, controls less than one (1) percent of the total U.S. market for services, in terms of revenues.

NOW THEREFORE, the Parties are entering into this Agreement to address national security, law enforcement and public safety issues.

ARTICLE 1: DEFINITION OF TERMS

As used in this Agreement:

1.1 "Call Associated Data" or "CAD" means any information related to a Domestic Communication or related to the sender or recipient of that Domestic Communication and, to the extent maintained by a Domestic Communications Company in the normal course of business, includes without limitation subscriber identification, called party number, calling party number, start time, end time, call duration, feature invocation and deactivation, feature interaction, registration information, user location, diverted to number, conference party numbers, post cut-through dial digit extraction, in-band and out-of-band signaling, and party add, drop and hold.

1.2 "Classified Information" means any information that has been determined pursuant to Executive Order 12958, or any predecessor or successor order, or the Atomic Energy Act of 1954, or any statute that succeeds or amends the Atomic Energy Act, to require protection against unauthorized disclosure.

1.3 "Control" and "Controls" means the power, direct or indirect, whether or not exercised, and whether or not exercised or exercisable through the ownership of a majority or a dominant minority of the total outstanding voting securities of an entity, or by proxy voting, contractual arrangements, or other means, to determine, direct, or decide matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach, or cause decisions regarding:

(a) the sale, lease, mortgage, pledge, or other transfer of any or all of the principal assets of the entity, whether or not in the ordinary course of business;

(b) the dissolution of the entity;

(c) the closing and/or relocation of the production or research and development facilities of the entity;

(d) the termination or nonfulfillment of contracts of the entity;

(e) the amendment of the articles of incorporation or constituent agreement of the entity with respect to the matters described in Section 1.3(a) through (d); or

(f) XO's obligations under this Agreement.

1.4 "Controlled Unclassified Information" means unclassified information, the export of which is controlled by the International Traffic in Arms Regulations (ITAR), 22 C.F.R. Chapter I, Subchapter M, or the Export Administration Regulations (EAR), 15 C.F.R., Chapter VII, Subchapter C.

1.5 "Data Centers" means (a) equipment (including firmware, software and upgrades), facilities, and premises used by (or on behalf of) one or more Domestic Communications Companies in connection with Hosting Services (including data storage and provisioning, control, maintenance, management, security, selling, billing, or monitoring of Hosting Services), and (b) equipment hosted by a Domestic Communications Company that is leased or owned by a Hosting Services customer.

1.6. "*De facto*" and "*de jure*" control have the meanings provided in 47 C.F.R. § 1.2110.

1.7. "DOJ" means the U.S. Department of Justice.

1.8 "Domestic Communications" means (i) Wire Communications or Electronic Communications (whether stored or not) from one U.S. location to another U.S. location and (ii) the U.S. portion of a Wire Communication or Electronic Communication (whether stored or not) that originates or terminates in the United States.

1.9 "Domestic Communications Company" means all those subsidiaries, divisions, departments, branches and other components of XO that (i) provide Domestic Communications, or (ii) engage in provisioning, control, maintenance, management, security, selling, billing, or monitoring of Hosting Services, or data storage in connection with Hosting Services. If any subsidiary, division, department, branch or other component of XO provides Domestic Communications or engages in Hosting Services after the date that all the Parties execute this Agreement, then such subsidiary, division, department, branch or other component of XO shall be deemed to be a Domestic Communications Company. If XO enters into joint ventures under which a joint venture or another entity may provide Domestic Communications or engage in Hosting Services, and if XO has the power or authority to exercise *de facto* or *de jure* control over such entity, then XO will ensure that that entity shall fully comply with the terms of this Agreement. The term "Domestic Communications Company" shall not include acquisitions by XO in the U.S. after the date this Agreement is executed by all parties only if the DOJ or the FBI find that the terms of this Agreement are inadequate to address national security, law enforcement or public safety concerns presented by that acquisition and the necessary modifications to this Agreement cannot be reached pursuant to Section 8.8 below.

1.10 "Domestic Communications Infrastructure" means (a) transmission and switching equipment (including software and upgrades) subject to control by a Domestic Communications Company and in use to provide, process, direct, control, supervise or manage Domestic

Communications, and (b) facilities and equipment in use by or on behalf of a Domestic Communications Company that are physically located in the United States; or (c) facilities in use by or on behalf of a Domestic Communications Company to control the equipment described in (a) and (b) above. Domestic Communications Infrastructure does not include equipment or facilities used by service providers that are not Domestic Communications Companies and that are:

(a) interconnecting communications providers; or

(b) providers of services or content that are

(i) accessible using the communications services of Domestic Communications Companies, and

(ii) available in substantially similar form and on commercially reasonable terms through communications services of companies other than Domestic Communications Companies.

1.11 "Effective Date" means the date on which the transactions contemplated by the Stock Purchase Agreement are consummated and Telmex acquires the stock of XO.

1.12 "Electronic Communication" has the meaning given it in 18 U.S.C. § 2510(12).

1.13 "Electronic Surveillance" means (a) the interception of wire, oral, or electronic communications as defined in 18 U.S.C. §§ 2510(1), (2), (4) and (12), respectively, and electronic surveillance as defined in 50 U.S.C. § 1801(f); (b) access to stored wire or electronic communications, as referred to in 18 U.S.C. § 2701 et seq.; (c) acquisition of dialing or signaling information through pen register or trap and trace devices or other devices or features capable of acquiring such information pursuant to law as defined in 18 U.S.C. § 3121 et seq. and 50 U.S.C. § 1841 et seq.; (d) acquisition of location-related information concerning a service subscriber or facility; (e) preservation of any of the above information pursuant to 18 U.S.C. § 2703(f); and (f) access to, or acquisition or interception of, or preservation of communications or information as described in (a) through (e) above and comparable State laws.

1.14 "FBI" means the Federal Bureau of Investigation.

1.15 "Foreign" where used in this Agreement, whether capitalized or lower case, means non-U.S.

1.16 "Forstmann Little" means Forstmann Little & Co. Equity Partnership-VII, L.P. and Forstmann Little & Co. Subordinated Debt and Equity Management Buyout Partnership-VIII, L.P.

1.17 "Governmental Authority" or "Governmental Authorities" means any government, or any governmental, administrative, or regulatory entity, authority, commission, board, agency, instrumentality, bureau or political subdivision and any court, tribunal, judicial or arbitral body.

1.18 "Hosting Services" means Web hosting (whether shared or dedicated, and including design, server management, maintenance and telecommunications services), Web site traffic management, electronic commerce, streamed media services, server collocation and management, application hosting, and all other similar services offered by XO or any of its subsidiaries, affiliates, divisions, departments, branches or other components.

1.19 "Intercept" or "Intercepted" has the meaning defined in 18 U.S.C. § 2510(4).

1.20 "Lawful U.S. Process" means lawful U.S. federal, state or local Electronic Surveillance or other court orders, processes, or authorizations issued under U.S. federal, state, or local law for physical search or seizure, production of tangible things, or access to or disclosure of Domestic Communications, Call Associated Data, or U.S. Hosting Data, including Transactional Data or Subscriber Information.

1.21 "Party" and "Parties" have the meanings given them in the Preamble.

1.22 "*Pro forma* assignments" or "*pro forma* transfers of control" are transfers that do not involve a substantial change in ownership or control as provided by Section 63.24 of the FCC's Rules (47 C.F.R. § 63.24).

1.23 "Sensitive Information" means information that is not Classified Information regarding (a) the persons or facilities that are the subjects of Lawful U.S. Process, (b) the identity of the government agency or agencies serving such Lawful U.S. Process, (c) the location or identity of the line, circuit, transmission path, or other facilities or equipment used to conduct Electronic Surveillance pursuant to Lawful U.S. Process, (d) the means of carrying out Electronic Surveillance pursuant to Lawful U.S. Process, (e) the type(s) of service, telephone number(s), records, communications, or facilities subjected to Lawful U.S. Process, and (f) other information that is not Classified Information designated in writing by an authorized official of a federal, state or local law enforcement agency or a U.S. intelligence agency as "Sensitive Information." Domestic Communications Companies may dispute pursuant to Article 4 whether information is Sensitive Information under this subparagraph. Such information shall be treated as Sensitive Information unless and until the dispute is resolved in the Domestic Communications Companies' favor.

1.24 "Sensitive Network Monitoring Position" means a position that involves access to Domestic Communications Infrastructure or Data Centers that enables a person to monitor the content of a subscriber's Wire or Electronic Communications (including those in electronic storage) other than (i) on occasion in the course of outside plant operations and maintenance functions or (ii) sales, marketing or customer care communications made by, or customer-oriented communications to, Domestic Communications Company personnel.

1.25 "Subscriber Information" means information relating to subscribers or customers of Domestic Communications Companies, including U.S. Hosting Services Customers (or the end-users of U.S. Hosting Services Customers), of the type referred to and accessible subject to procedures specified in 18 U.S.C. § 2703(c) or (d) or 18 U.S.C. § 2709. Such information shall also be considered Subscriber Information when it is sought pursuant to the provisions of other Lawful U.S. Process.

1.26 "Telmex" means Teléfonos de México, S.A. de C.V., a Mexican corporation, and includes its indirect wholly-owned subsidiary Teninver, S.A. de C.V.

1.27 "Transactional Data" means:

(a) "call identifying information," as defined in 47 U.S.C. § 1001(2), including without limitation the telephone number or similar identifying designator associated with a Domestic Communication;

(b) any information possessed by a Domestic Communications Company relating specifically to the identity and physical address of a customer or subscriber or account payer, or the end-user of such customer or subscriber or account payer, or associated with such person relating to all telephone numbers, domain names, IP addresses, Uniform Resource Locators ("URLs"), other identifying designators, types of services, length of service, fees, usage including billing records and connection logs, and the physical location of equipment, if known and if different from the location information provided under (c) below;

(c) the time, date, size or volume of data transfers, duration, domain names, MAC or IP addresses (including source and destination), URLs, port numbers, packet sizes, protocols or services, special purpose flags, or other header information or identifying designators or characteristics associated with any Domestic Communication, or other Wire or Electronic Communication within the definition of U.S. Hosting Data, including electronic mail headers showing From: and To: addresses; and

(d) as to any mode of transmission (including mobile transmissions), and to the extent permitted by U.S. laws, any information indicating as closely as possible the physical location to or from which a Domestic Communication, or other Wire or Electronic Communication within the definition of U.S. Hosting Data, is transmitted.

The term includes all records or other information of the type referred to and accessible subject to procedures specified in 18 U.S.C. § 2703(c)(1) and (d) but does not include the content of any communication.

1.28 "United States," "US," or "U.S." means the United States of America including all of its States, districts, territories, possessions, commonwealths, and the special maritime and territorial jurisdiction of the United States.

1.29 "U.S. Hosting Services Customer" is a customer or subscriber that receives Hosting Services from a Domestic Communications Company and that is U.S.-domiciled or holds itself out as being U.S.-domiciled. A customer or subscriber will be considered to be U.S.-domiciled if (i) it has its principal office(s) or place(s) of business in the United States, (ii) it is incorporated in the United States, (iii) it receives Hosting Services facilitated by a Data Center that is physically located in the United States, or (iv) other criteria tend to indicate that it is U.S.-domiciled.

1.30 "U.S. Hosting Data" means all data, records, documents, or information (including Domestic Communications, other Wire or Electronic Communications, Subscriber Information,

and Transactional Data) in any form (including paper, electronic, magnetic, mechanical, or photographic) transmitted, received, generated, maintained, processed, used by or stored in a Data Center for a U.S. Hosting Services Customer.

1.31 "XO" means XO Communications, Inc., a Delaware corporation.

1.32 "Wire Communication" has the meaning given it in 18 U.S.C. § 2510(1).

1.33 Other Definitional Provisions. Other capitalized terms used in this Agreement and not defined in this Article shall have the meanings assigned them elsewhere in this Agreement. The definitions in this Agreement are applicable to the singular as well as the plural forms of such terms and to the masculine as well as to the feminine and neuter genders of such term. Whenever the words "include," "includes," or "including" are used in this Agreement, they shall be deemed to be followed by the words "without limitation."

ARTICLE 2: FACILITIES, INFORMATION STORAGE AND ACCESS

2.1 Domestic Communications Infrastructure. Except to the extent and under conditions concurred in by the FBI and the DOJ in writing:

(a) In the absence of strictly *bona fide* commercial reasons, all Domestic Communications Infrastructure that is owned, operated or controlled by a Domestic Communications Company shall at all times be located in the United States and will be directed, controlled, supervised and managed by a Domestic Communications Company; and

(b) all Domestic Communications that are carried by or through, in whole or in part, the Domestic Communications Infrastructure shall pass through a facility under the control of a Domestic Communications Company and physically located in the United States, from which Electronic Surveillance can be conducted pursuant to Lawful U.S. Process. The Domestic Communications Company will provide technical or other assistance to facilitate such Electronic Surveillance.

2.2 Data Centers and Access to Communications. Except to the extent and under conditions concurred in by the FBI and the DOJ in writing:

(a) all Data Centers used to provide Hosting Services to U.S. Hosting Services Customers shall at all times be located in the United States, except strictly for a bona fide commercial reason; and

(b) a Domestic Communications Company shall, upon service of appropriate Lawful U.S. Process, ensure that Wire or Electronic Communications of a specified U.S. Hosting Services Customer that are transmitted to, from or through a Data Center shall be accessible from or pass through a facility under the control of a Domestic Communications Company and physically located in the United States, from which Electronic Surveillance can be conducted in a timely manner. The Domestic Communications Company will provide technical or other assistance to facilitate such Electronic Surveillance.

2.3 Compliance with Lawful U.S. Process. Domestic Communications Companies shall take all practicable steps to configure its Domestic Communications Infrastructure and Data Centers (except for equipment that is owned or controlled by a U.S. Hosting Services Customer and is collocated in XO-controlled space in a Data Center) to be capable of complying, and Domestic Communications Company employees in the United States will have unconstrained authority to comply, in an effective, efficient, and unimpeded fashion, with:

(a) Lawful U.S. Process;

(b) the orders of the President in the exercise of his/her authority under § 706 of the Communications Act of 1934, as amended, (47 U.S.C. § 606), and under § 302(e) of the Aviation Act of 1958 (49 U.S.C. § 40107(b)) and Executive Order 11161 (as amended by Executive Order 11382); and

(c) National Security and Emergency Preparedness rules, regulations and orders issued pursuant to the Communications Act of 1934, as amended (47 U.S.C. § 151 et seq.).

2.4 Information Storage and Access. Domestic Communications Companies shall have the ability to provide in the United States the following:

(a) stored Domestic Communications, if such communications are stored by or on behalf of a Domestic Communications Company for any reason;

(b) any Wire Communications or Electronic Communications (including any other type of wire, voice or electronic communication not covered by the definitions of Wire Communication or Electronic Communication) received by, intended to be received by, or stored in the account of a customer or subscriber of a Domestic Communications Company, if such communications are stored by or on behalf of a Domestic Communications Company for any reason;

(c) Transactional Data and Call Associated Data relating to Domestic Communications, if such data are stored by or on behalf of a Domestic Communications Company for any reason;

(d) Subscriber Information, if such information is stored by or on behalf of a Domestic Communications Company for any reason, concerning customers who are U.S.-domiciled, customers who hold themselves out as being U.S.-domiciled, and customers who make a Domestic Communication; and

(e) billing records of customers who are U.S.-domiciled, customers who hold themselves out as being U.S.-domiciled, and customers who make a Domestic Communication, for so long as such records are kept and at a minimum for as long as such records are required to be kept pursuant to applicable U.S. law or this Agreement.

2.5 Mandatory Destruction. Domestic Communications Companies shall take all technically feasible steps to ensure that the data and communications described in Section 2.4(a)-(e) of this Agreement are stored in a manner not subject to mandatory destruction under any foreign laws, if

such data and communications are stored by or on behalf of a Domestic Communications Company for any reason. Domestic Communications Companies shall ensure that the data and communications described in Section 2.4(a)-(e) of this Agreement shall not be stored by or on behalf of a Domestic Communications Company outside of the United States unless such storage is strictly for *bona fide* commercial reasons weighing in favor of storage outside the United States.

2.6 U.S. Hosting Data Storage and Access. Domestic Communications Companies shall have the ability to provide in the United States stored U.S. Hosting Data (whether in "electronic storage" as defined in 18 U.S.C. § 2510(17) or stored in any other manner), except for stored U.S. Hosting Data located on equipment that is owned or controlled by a U.S. Hosting Services Customer and is collocated in XO-controlled space in a Data Center. Domestic Communications Companies shall ensure that such data shall not be stored outside of the United States unless such storage is strictly for bona fide commercial reasons weighing in favor of storage outside the United States. In any event, Domestic Communications Companies shall take all technically feasible steps to ensure that such data is stored in a manner not subject to mandatory destruction under any foreign laws.

2.7 Billing Records. Domestic Communications Companies shall store for at least 18 months all billing records described in Section 2.4(e) above and all billing records relating to U.S. Hosting Services Customers, and shall make such records available in the U.S. Nothing in this paragraph shall require a Domestic Communications Company to store such records for longer than 18 months.

2.8 Storage Pursuant to 18 U.S.C. § 2703(f). Upon a request made pursuant to 18 U.S.C. § 2703(f) by a Governmental Authority within the United States to preserve (i) any information in the possession, custody, or control of Domestic Communications Companies that is enumerated in Section 2.4 above, or (ii) any U.S. Hosting Data, Domestic Communications Companies shall store such preserved records or other evidence in the United States.

2.9 Compliance with U.S. Law. Nothing in this Agreement shall excuse a Domestic Communications Company from any obligation it may have to comply with U.S. legal requirements for the retention, preservation, or production of such information or data. Similarly, in any action to enforce Lawful U.S. Process, Domestic Communication Companies have not waived any legal right they might have to resist such process.

2.10 Routing of Domestic Communications and U.S. Hosting Data. Except strictly for *bona fide* commercial reasons, Domestic Communications Companies shall not route Domestic Communications or U.S. Hosting Data outside the United States.

2.11 CPNI. Domestic Communications Companies shall comply, with respect to Domestic Communications, with all applicable FCC rules and regulations governing access to and storage of Customer Proprietary Network Information ("CPNI"), as defined in 47 U.S.C. § 222(h)(1).

2.12 Storage of Protected Information. The storage of Classified, Controlled Unclassified, and Sensitive Information by a Domestic Communications Company or its contractors at any

location outside of the United States is prohibited, unless the storage is at a U.S. military facility, a U.S. Embassy or Consulate or other location occupied by a U.S. government organization.

ARTICLE 3: SECURITY

3.1 Measures to Prevent Improper Use or Access. Domestic Communications Companies shall take all reasonable measures to prevent the use of or access to the Domestic Communications Infrastructure or to Data Centers to conduct Electronic Surveillance, or to obtain or disclose Domestic Communications, U.S. Hosting Data, Classified Information, Sensitive Information, or Controlled Unclassified Information, in violation of any U.S. federal, state, or local laws or the terms of this Agreement. These measures shall include creating and complying with detailed technical, organizational, operational, and personnel controls, policies and written procedures, necessary implementation plans, and physical security measures.

3.2 Access by Foreign Government Authority. Domestic Communications Companies shall not, directly or indirectly, disclose or permit disclosure of, or provide access to Domestic Communications, U.S. Hosting Data, Call Associated Data, Transactional Data, or Subscriber Information stored by Domestic Communications Companies in the United States to any person if the purpose of such access is to respond to the legal process or the request of or on behalf of a foreign government, identified representative, component or subdivision thereof without the express written consent of the DOJ or the authorization of a court of competent jurisdiction in the United States. Any such requests or submission of legal process described in this Section 3.2 of this Agreement shall be reported to the DOJ as soon as possible and in no event later than five (5) business days after such request or legal process is received by and known to the security officer designated under Section 3.8 of this Agreement. Domestic Communications Companies shall take reasonable measures to ensure that the security officer designated under Section 3.8 of this Agreement will promptly learn of all such requests or submission of legal process described in this Section 3.2 of this Agreement.

3.3 Disclosure to Foreign Government Authorities. Domestic Communications Companies shall not, directly or indirectly, disclose or permit disclosure of, or provide access to:

(a) Classified, Sensitive, or Controlled Unclassified Information; or

(b) Subscriber Information, Transactional Data, Call Associated Data, or U.S. Hosting Data, including a copy of any Wire Communications or Electronic Communication, intercepted or acquired pursuant to Lawful U.S. Process

to any foreign government, identified representative, component or subdivision thereof without satisfying all applicable U.S. federal, state and local legal requirements pertinent thereto, and obtaining the express written consent of the DOJ or the authorization of a court of competent jurisdiction in the United States. Any requests or any legal process submitted by a foreign government, an identified representative, a component or subdivision thereof to Domestic Communications Companies for the communications, data or information identified in this

Section 3.3 of this Agreement that is maintained by Domestic Communications Companies shall be referred to the DOJ as soon as possible and in no event later than five (5) business days after such request or legal process is received by and known to the security officer designated under Section 3.8 of this Agreement unless the disclosure of the request or legal process would be in violation of an order of a court of competent jurisdiction within the United States. Domestic Communications Companies shall take reasonable measures to ensure that the security officer designated under Section 3.8 of this Agreement will promptly learn of all such requests or submission of legal process described in this Section 3.3.

3.4 Notification of Access or Disclosure Requests from Foreign Non-Governmental Entities. Within 90 days of receipt, Domestic Communications Companies shall notify DOJ in writing of legal process or requests by foreign nongovernmental entities to Domestic Communications Companies for access to or disclosure of (i) U.S. Hosting Data, or (ii) Domestic Communications carried by or through, in whole or in part, the Domestic Communications Infrastructure, unless the disclosure of the legal process or request would be in violation of an order of a court of competent jurisdiction within the United States.

3.5 Security of Lawful U.S. Process. Domestic Communications Companies shall protect the confidentiality and security of all Lawful U.S. Process served upon them and the confidentiality and security of Classified, Sensitive, and Controlled Unclassified Information in accordance with U.S. federal and state law or regulation and this Agreement. Information concerning Lawful U.S. Process, Classified Information, Sensitive Information, or Controlled Unclassified Information shall be under the custody and control of the security officer designated under Section 3.8 of this Agreement.

3.6 Points of Contact. Within fourteen (14) days after the Effective Date, Domestic Communications Companies shall designate points of contact within the United States with the authority and responsibility for accepting and overseeing the carrying out of Lawful U.S. Process. The points of contact shall be assigned to Domestic Communications Companies' security office(s) in the United States, shall be available twenty-four (24) hours per day, seven (7) days per week and shall be responsible for accepting service and maintaining the security of Classified, Sensitive, and Controlled Unclassified Information and any Lawful U.S. Process in accordance with the requirements of U.S. law and this Agreement. Promptly after designating such points of contact, Domestic Communications Companies shall notify the FBI and the DOJ in writing of the points of contact, and thereafter shall promptly notify the FBI and the DOJ of any change in such designation. The points of contact shall be resident U.S. citizens who are eligible for appropriate U.S. security clearances and shall serve as points of contact for new Domestic Communications Companies unless and until the FBI and the DOJ are notified of any change in designation. Domestic Communications Companies shall cooperate with any request by a Government Authority within the United States that a background check and/or security clearance process be completed for a designated point of contact.

3.7 Information Security Plan. Domestic Communications Companies shall develop, document, implement, and maintain an information security plan to:

(a) maintain appropriately secure facilities (*e.g.*, offices) within the United States for the handling and storage of any Classified, Sensitive or Controlled Unclassified Information;

(b) take appropriate measures to prevent unauthorized access to data or facilities that might contain Classified, Sensitive, or Controlled Unclassified Information;

(c) assign U.S. citizens, who meet high standards of trustworthiness for maintaining the confidentiality of Sensitive Information and Wire or Electronic Communications, to positions that handle or that regularly deal with information identifiable to such person as Sensitive Information or to Sensitive Network Monitoring Positions;

(d) upon request from the DOJ or FBI, provide the name, social security number and date of birth of each person who regularly handles or deals with Sensitive Information;

(e) require that personnel handling Classified Information shall have been granted appropriate security clearances;

(f) provide that the points of contact described in Section 3.6 of this Agreement shall have sufficient authority over any of Domestic Communications Companies' employees who may handle Classified, Sensitive, or Controlled Unclassified Information to maintain the confidentiality and security of such information in accordance with applicable U.S. legal authority and the terms of this Agreement; and

(g) ensure that the disclosure of or access to Classified, Sensitive, or Controlled Unclassified Information is limited to those who have the appropriate security clearances and authority.

3.8 Security Officer Responsibilities and Duties. Within 14 calendar days after the Effective Date, XO shall designate, from among the points of contact selected pursuant to Section 3.6, a security officer within the United States with the primary responsibility for carrying out the Domestic Communications Companies' obligations under Sections 3.5, 3.6, and 3.7 of this Agreement.

3.9 Disclosure of Protected Data. In carrying out the responsibilities set forth in Section 3.8, the designated security officer shall not directly or indirectly disclose information concerning Lawful U.S. Process, Classified Information, Sensitive Information, or Controlled Unclassified Information to any XO or Domestic Communication Company's officer, director, shareholder, employee, agent, or contractor, including those who serve in a supervisory, managerial or officer role with respect to the security officer, unless disclosure has been approved by prior written consent obtained from the FBI or the DOJ or there is an official need for disclosure of the information in order to fulfill an obligation consistent with the purpose for which the information is collected or maintained.

3.10 Notice of Obligations. Domestic Communications Companies shall instruct appropriate officials, employees, contractors, and agents as to the security restrictions and safeguards imposed by this Agreement, including the reporting requirements in Sections 5.5, 5.6, and 5.7 of this Agreement, and shall issue periodic reminders to them of such obligations.

3.11 Access to Classified, Controlled Unclassified, or Sensitive Information. Nothing contained in this Agreement shall limit or affect the authority of a U.S. government agency to deny, limit or revoke Domestic Communications Companies' access to Classified, Controlled Unclassified, and Sensitive Information under that agency's jurisdiction.

ARTICLE 4: DISPUTES

4.1 Informal Resolution. The Parties shall use their best efforts to resolve any disagreements that may arise under this Agreement. Disagreements shall be addressed, in the first instance, at the staff level by the Parties' designated representatives. Any disagreement that has not been resolved at that level shall be submitted promptly to the General Counsel of XO, the General Counsel of the FBI, and the Deputy Attorney General, Criminal Division, DOJ, or their designees, unless the FBI or the DOJ believes that important national interests can be protected, or a Domestic Communications Company believes that its paramount commercial interests can be resolved, only by resorting to the measures set forth in Section 4.2 of this Agreement. If, after meeting with higher authorized officials, any of the Parties determines that further negotiation would be fruitless, then that Party may resort to the remedies set forth in Section 4.2 of this Agreement. If resolution of a disagreement requires access to Classified Information, the Parties shall designate a person or persons possessing the appropriate security clearances for the purpose of resolving that disagreement.

4.2 Enforcement of Agreement. Subject to Section 4.1 of this Agreement, if any of the Parties believes that any other of the Parties has breached or is about to breach this Agreement, that Party may bring an action against the other Party for appropriate judicial relief. Nothing in this Agreement shall limit or affect the right of a U.S. government agency to:

(a) seek revocation by the FCC of any license, permit, or other authorization granted or given by the FCC to Domestic Communications Companies, or any other sanction by the FCC against Domestic Communications Companies;

(b) seek civil sanctions for any violation by XO or Domestic Communications Companies of any U.S. law or regulation or term of this Agreement; or

(c) pursue criminal sanctions against Domestic Communications Companies, or any director, officer, employee, representative, or agent of Domestic Communications Companies, or against any other person or entity, for violations of the criminal laws of the United States.

4.3 Irreparable Injury. XO agrees that the United States would suffer irreparable injury if for any reason a Domestic Communications Company failed to perform any of its significant obligations under this Agreement, and that monetary relief would not be an adequate remedy. Accordingly, XO agrees that, in seeking to enforce this Agreement against Domestic Communications Companies, the FBI and the DOJ shall be entitled, in addition to any other

remedy available at law or equity, to specific performance and injunctive or other equitable relief.

4.4 Waiver. The availability of any civil remedy under this Agreement shall not prejudice the exercise of any other civil remedy under this Agreement or under any provision of law, nor shall any action taken by a Party in the exercise of any remedy be considered a waiver by that Party of any other rights or remedies. The failure of any Party to insist on strict performance of any of the provisions of this Agreement, or to exercise any right they grant, shall not be construed as a relinquishment or future waiver, rather, the provision or right shall continue in full force. No waiver by any Party of any provision or right shall be valid unless it is in writing and signed by the Party.

4.5 Forum Selection. It is agreed by and between the Parties that a civil action among the Parties for judicial relief with respect to any dispute or matter whatsoever arising under, in connection with, or incident to, this Agreement shall be brought, if at all, in the United States District Court for the District of Columbia.

4.6 Effectiveness of Article 4. This Article 4, and the obligations imposed and rights conferred herein, shall be effective upon the execution of this Agreement by all the Parties.

ARTICLE 5: AUDITING, REPORTING, NOTICE AND LIMITS

5.1 Filings re *de jure* or *de facto* control of a Domestic Communications Company. If any Domestic Communications Company makes any filing with the FCC or any other Governmental Authority relating to the *de facto* or *de jure* control of a Domestic Communications Company except for filings with the FCC for assignments or transfers of control to any Domestic Communications Company that are *pro forma*, XO shall promptly provide to the FBI and the DOJ written notice and copies of such filing. This Section 5.1 is effective upon execution of this Agreement by all the Parties.

5.2 Control of XO. If any member of the senior management of XO or a Domestic Communications Company (including the Chief Executive Officer, President, General Counsel, Chief Technical Officer, Chief Financial Officer or other senior officer) acquires any information that reasonably indicates that any single foreign entity or individual, other than Telmex, has or will likely obtain an ownership interest (direct or indirect) in XO above 25 percent, as determined in accordance with 47 C.F.R. § 63.09, or if any single foreign entity or individual has or will likely otherwise gain either (1) Control or (2) *de facto* or *de jure* control of XO, then such member shall promptly cause to be notified the security officer designated under Section 3.8 of this Agreement, who in turn, shall promptly notify the FBI and the DOJ in writing. Notice under this section shall, at a minimum:

(a) Identify the entity or individual(s) (specifying the name, addresses and telephone numbers of the entity);

(b) Identify the beneficial owners of the increased or prospective increased interest in XO by the entity or individual(s) (specifying the name, addresses and telephone numbers of each beneficial owner); and

(c) Quantify the amount of ownership interest in XO that has resulted in or will likely result in the entity or individual(s) increasing the ownership interest in or control of XO.

5.3 Notice of Decision to Store Information or Use Infrastructure Outside of the U.S. Domestic Communications Companies shall provide to the FBI and the DOJ thirty (30) days advance notice if a Domestic Communications Company plans to (i) store or have stored on its behalf a Domestic Communication, U.S. Hosting Data, Transactional Data, Call Associated Data, or Subscriber Information outside the United States; (ii) provide Domestic Communications from Domestic Communications Infrastructure that is located outside of the U.S.; or (iii) provide Hosting Services to a U.S. Hosting Services Customer using a Data Center located outside the U.S. Such notice shall, at a minimum, (a) include a description of the type of information or infrastructure to be stored or located outside the United States, (b) identify the custodian of the information if other than a Domestic Communications Company, (c) identify the location where the information or infrastructure is to be located, and (d) identify the factors considered in deciding to store or locate the information or infrastructure outside of the United States (see Sections 2.1(a), 2.2(a), 2.5, 2.6, and 2.10 of this Agreement). This Section 5.3 is effective upon execution of this Agreement by all the Parties.

5.4 Joint Ventures. A Domestic Communications Company may have entered into or may enter into joint ventures under which the joint venture or entity may provide Domestic Communications. To the extent that such Domestic Communications Company does not have *de facto* or *de jure* control over a joint venture or entity, such Domestic Communications Company shall in good faith (a) notify such entity of this Agreement and its purposes, (b) endeavor to have such entity comply with this Agreement as if it were a Domestic Communications Company, and (c) consult with the FBI or the DOJ about the activities of such entity. Nothing in this Section 5.4 does nor shall it be construed to relieve Domestic Communications Companies of obligations under Article 2 of this Agreement. The obligations of Domestic Communications Companies under this Section 5.4 shall not be considered "significant obligations" for purposes of Section 4.3 of this Agreement.

5.5 Outsourcing Third Parties. If a Domestic Communications Company outsources functions covered by this Agreement to a third party that is not a Domestic Communications Company, that Domestic Communications Company shall take reasonable steps to ensure that the third party complies with the applicable terms of this Agreement. Such steps shall include the following:

(a) the Domestic Communications Company shall include in its contracts with any such third parties written provisions requiring that such third parties comply with all applicable terms of this Agreement (or take other reasonable, good-faith measures to ensure that such third parties are aware of, agree to, and are bound to comply with the applicable obligations of this Agreement);

(b) if the Domestic Communications Company learns that the outsourcing third party or the outsourcing third party's employee has violated an applicable provision of this Agreement, the Domestic Communications Company will notify the DOJ and the FBI promptly; and

(c) with consultation and, as appropriate, cooperation with the DOJ and the FBI, the Domestic Communications Company will take reasonable steps necessary to rectify promptly the situation, which steps may (among others) include terminating the arrangement with the outsourcing third party, including after notice and opportunity for cure, and/or initiating and pursuing litigation or other remedies at law and equity.

5.6 Notice of Foreign Influence. If any member of the senior management of XO or a Domestic Communications Company (including the Chief Executive Officer, President, General Counsel, Chief Technical Officer, Chief Financial Officer or other senior officer) acquires any information that reasonably indicates that any foreign government, any foreign government-controlled entity, or any foreign entity:

(a) plans to participate or has participated in any aspect of the day-to-day management of XO or a Domestic Communications Company in such a way that interferes with or impedes the performance by XO or a Domestic Communications Company of its duties and obligations under the terms of this Agreement, or interferes with or impedes the exercise by XO or a Domestic Communications Company of its rights under the Agreement, or

(b) plans to exercise or has exercised, as a direct or indirect shareholder of XO or a Domestic Communications Company or their subsidiaries, any Control of XO or a Domestic Communications Company in such a way that interferes with or impedes the performance by XO or a Domestic Communications Company of its duties and obligations under the terms of this Agreement, or interferes with or impedes the exercise by XO or a Domestic Communications Company of its rights under the terms of this Agreement, or in such a way that foreseeably concerns XO's or a Domestic Communications Company's obligations under this Agreement,

then such member shall promptly cause to be notified the security officer designated under Section 3.8 of this Agreement, who in turn, shall promptly notify the FBI and the DOJ in writing of the timing and the nature of the foreign government's or entity 's plans and/or actions.

5.7 Reporting of Incidents. XO and Domestic Communications Companies shall take practicable steps to ensure that, if any XO or Domestic Communications Companies officer, director, employee, contractor or agent acquires any information that reasonably indicates: (a) a breach of this Agreement; (b) access to or disclosure of U.S. Hosting Data or Domestic Communications, or the conduct of Electronic Surveillance, in violation of federal, state or local law or regulation; (c) access to or disclosure of CPNI or Subscriber Information in violation of federal, state or local law or regulation (except for violations of FCC regulations relating to improper use of CPNI); or (d) improper access to or disclosure of Classified, Sensitive, or Controlled Unclassified Information, then the individual will notify the security officer designated in Section 3.8 of this Agreement, who will in turn notify the FBI and the DOJ in the same manner as specified in Section 5.6. This report shall be made promptly and in any event no later than 10 calendar days after XO or the Domestic Communications Company acquires information indicating a matter described in Section 5.7(a)-(d) of this Agreement. XO and the Domestic Communications Companies shall lawfully cooperate in investigating the matters described in this section of this Agreement. XO or the Domestic Communications Company

need not report information where disclosure of such information would be in violation of an order of a court of competent jurisdiction in the United States.

5.8 Access to Information. In response to reasonable requests made by the FBI or the DOJ, Domestic Communications Companies shall provide access to information concerning technical, physical, management, or other security measures and other reasonably available information needed by the DOJ or the FBI to assess compliance with the then-effective terms of this Agreement.

5.9 Visits and Inspections. The FBI and the DOJ may visit and inspect any part of Domestic Communications Companies' Domestic Communications Infrastructure, Data Centers, and security offices for the purpose of verifying compliance with the terms of this Agreement. Such inspections shall be reasonable in number and be conducted during normal business hours upon reasonable notice, which shall ordinarily be no less than 24 hours in advance of the visit. Domestic Communications Companies may have appropriate Domestic Communications Companies employees accompany U.S. government representatives throughout any such inspection.

5.10 Access to Personnel. Upon reasonable notice from the FBI or the DOJ, Domestic Communications Companies will make reasonably available for interview officers or employees of Domestic Communications Companies, and will seek to require contractors to make available appropriate personnel located in the United States who are in a position to provide information to verify compliance with the then-effective terms of this Agreement.

5.11 Annual Report. On or before the last day of January of each year, a designated senior corporate officer of Domestic Communications Companies shall submit to the FBI and the DOJ a report assessing Domestic Communications Companies' compliance with the terms of this Agreement for the preceding calendar year. The report shall include:

(a) a copy of the policies and procedures adopted to comply with this Agreement;

(b) a summary of the changes, if any, to the policies or procedures, and the reasons for those changes;

(c) a summary of any known acts of material noncompliance with the terms of this Agreement, whether inadvertent or intentional, with a discussion of what steps have been or will be taken to prevent such acts from occurring in the future; and

(d) identification of any other issues that, to Domestic Communications Companies' knowledge, will or reasonably could affect the effectiveness of or compliance with this Agreement.

5.12 Notices. Effective upon execution of this Agreement by all the Parties, all notices and other communications given or made relating to this Agreement, such as a proposed modification, shall be in writing and shall be deemed to have been duly given or made as of the date of receipt and shall be (a) delivered personally, or (b) sent by facsimile, (c) sent by documented overnight courier service, or (d) sent by registered or certified mail, postage prepaid, addressed to the Parties' designated representatives at the addresses shown below, or to such

other representatives at such others addresses as the Parties may designate in accordance with this Section:

Department of Justice
Assistant Attorney General
Criminal Division
Main Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Federal Bureau of Investigation
General Counsel
935 Pennsylvania Avenue, NW
Washington, DC 20535

Cathleen A. Massey
Vice President – External Affairs/Asst. General Counsel
XO COMMUNICATIONS, INC.
1730 Rhode Island Ave. NW, Suite 1000
Washington, DC 20036
Telephone: (202) 721-0983
Fax: (202) 721-0995

XO COMMUNICATIONS, INC.
11111 Sunset Hills Road
Reston, VA 20190
Attention: General Counsel
Telephone: (703) 547-2000
Fax: (703) 547-2025

With a copy to:

Federal Bureau of Investigation
The Assistant Director
National Security Division
935 Pennsylvania Avenue, NW
Washington, DC 20535

Kelley Drye & Warren L.L.P.
1200 Nineteenth Street, N.W.
Washington, D.C. 20036-2423
Attention: Brad E. Mutschelknaus

ARTICLE 6: FREEDOM OF INFORMATION ACT

6.1 Protection from Disclosure. The DOJ and FBI shall take all reasonable measures to protect from public disclosure all information submitted by a Domestic Communications Company or other entities in accordance with the terms of this Agreement to the DOJ or FBI in connection with this Agreement and clearly marked with the legend "Business Confidential; subject to protection under 5 U.S.C. § 553(b); not to be released without notice to the filing party" or similar designation. Such markings shall signify that it is the company's position that the information so marked constitutes "trade secrets" and/or "commercial or financial information obtained from a person and privileged or confidential," or otherwise warrants protection within the meaning of 5 U.S.C. 552(b)(4). For the purposes of 5 U.S.C. 552(b)(4), the Parties agree that information so marked is voluntarily submitted. If a request is made under 5 U.S.C. 552(a)(3) for information so marked, and disclosure of any information (including disclosure in redacted form) is contemplated, the DOJ or FBI, as appropriate, shall notify the company of the intended disclosure as provided by Executive Order 12600, 52 Fed. Reg. 23781 (June 25, 1987). If the Domestic Communications Company objects to the intended disclosure and its objections are not sustained, the DOJ or FBI, as appropriate, shall notify the company of its intention to release (as provided by Section 5 of E.O. 12600) not later than five business days prior to disclosure of the challenged information.

6.2 Use of Information for U.S. Government Purposes. Nothing in this Agreement shall prevent the FBI or the DOJ from lawfully disseminating information as appropriate to seek enforcement of this Agreement, or from lawfully sharing information as appropriate with other federal, state, or local government agencies to protect public safety, law enforcement, or national security interests, provided that the FBI and the DOJ take all reasonable measures to protect from public disclosure the information marked as described in Section 6.1.

6.3 Unlawful Disclosure of Information. The DOJ and FBI acknowledge that officers and employees of the United States and of any department or agency thereof are subject to liability under 18 U.S.C. § 1905 for unlawful disclosure of information provided to them by other Parties to this Agreement.

ARTICLE 7: FCC CONDITION AND CFIUS

7.1 FCC Approval. Upon the execution of this Agreement by all the Parties, the FBI and the DOJ shall promptly notify the FCC that, provided the FCC adopts a condition substantially the same as set forth in Exhibit A attached hereto (the "Condition to FCC Authorization"), the FBI and the DOJ have no objection to the FCC's grant of the applications filed with the FCC in FCC IB Docket No. 02-50. This Section 7.1 is effective upon execution of this Agreement by all the Parties.

7.2 Future Applications. XO agrees that in any application or petition by any Domestic Communications Company to the FCC for licensing or other authority filed with or granted by the FCC after the Effective Date, except with respect to *pro forma* assignments or *pro forma* transfers of control, the Domestic Communications Company shall request that the FCC condition the grant of such licensing or other authority on compliance with the terms of this Agreement. Notwithstanding Section 8.8, the FBI and the DOJ reserve the right to object, formally or informally, to the grant of any other FCC application or petition of XO or a Domestic Communications Company for a license or other authorization under Titles II and III of the

Communications Act of 1934, as amended, and to seek additional or different terms that would, consistent with the public interest, address any threat to their ability to enforce the laws, preserve the national security and protect the public safety raised by the transactions underlying such applications or petitions.

7.3 CFIUS. Provided that the FCC adopts the Condition to FCC Authorization, the Attorney General shall not make any objection to the CFIUS or the President concerning Telmex's investment in XO or grant of the applications filed with the FCC in FCC IB Docket No. 02-50. This commitment, however, does not extend to any objection the Attorney General may wish to raise with the CFIUS or the President in the event that (a) XO fails to comply with the terms of this Agreement, (b) the Attorney General learns that the representations of XO made to the DOJ, the FBI, or the FCC above are materially untrue or incomplete, (c) there is a material increase in the authority of a foreign entity to exercise Control of XO or a Domestic Communications Company, or (d) there is any other material change in the circumstances associated with the transactions at issue.

ARTICLE 8: OTHER

8.1 Right to Make and Perform Agreement. XO represents that it has and shall continue to have throughout the term of this Agreement the full right to enter into this Agreement and perform its obligations hereunder and that this Agreement is a legal, valid, and binding obligation of XO enforceable in accordance with its terms.

8.2 Headings. The Article headings and numbering in this Agreement are inserted for convenience only and shall not affect the meaning or interpretation of the terms of this Agreement.

8.3 Other Laws. Nothing in this Agreement is intended to limit or constitute a waiver of (a) any obligation imposed by any U.S. federal, state or local laws on XO or any Domestic Communications Company, (b) any enforcement authority available under any U.S. or state laws, (c) the sovereign immunity of the United States, or (d) any authority the U.S. government may possess over the activities of XO or any Domestic Communications Company located within or outside the United States. Nothing in this Agreement is intended to or is to be interpreted to require the Parties to violate any applicable U.S. law.

8.4 Statutory References. All references in this Agreement to statutory provisions shall include any future amendments to such statutory provisions.

8.5 Non-Parties. Nothing in this Agreement is intended to confer or does confer any rights on any person other than the Parties and any Governmental Authorities entitled to effect Electronic Surveillance pursuant to Lawful U.S. Process.

8.6 Modifications. This Agreement may only be modified by written agreement signed by all of the Parties. The FBI and the DOJ agree to consider in good faith and promptly possible modifications to this Agreement if XO believes that the obligations imposed on XO or the Domestic Communications Companies under this Agreement are substantially more restrictive than those imposed on other U.S. and foreign licensed service providers in like circumstances in order to protect U.S. national security, law enforcement, and public safety concerns. Any

substantial modification to this Agreement shall be reported to the FCC within thirty (30) days after approval in writing by the Parties.

8.7 Changes in Circumstances for XO or Domestic Communications Companies. The DOJ and the FBI agree to negotiate in good faith and promptly with respect to any request by XO or a Domestic Communications Company for relief from application of specific provisions of this Agreement: (a) if a Domestic Communications Company provides Domestic Communications solely through the resale of transmission or switching facilities owned by third parties, or (b) as regards future Domestic Communications Company activities or services, if those provisions become unduly burdensome or adversely affect XO's or a Domestic Communications Company's competitive position.

8.8 Changes in Circumstances for DOJ or FBI. If after the date that all the Parties have executed this Agreement the DOJ or the FBI finds that the terms of this Agreement are inadequate to address national security, law enforcement, or public safety concerns presented, or if a foreign government acquires an ownership interest in Telmex, then XO will negotiate in good faith to modify this Agreement to address those concerns.

8.9 Partial Invalidity. If any portion of this Agreement is declared invalid by a U.S. court of competent jurisdiction, this Agreement shall be construed as if such portion had never existed, unless such construction would constitute a substantial deviation from the Parties' intent as reflected in this Agreement.

8.10 Counterparts. This Agreement may be executed in one or more counterparts, including by facsimile, each of which shall together constitute one and the same instrument.

8.11 Successors and Assigns. This Agreement shall inure to the benefit of, and shall be binding upon, the Parties, and their respective successors and assigns.

8.12 Effectiveness of Agreement. Except as otherwise specifically provided in the provisions of this Agreement, the obligations imposed and rights conferred by this Agreement shall take effect upon the Effective Date.

8.13 Termination of Agreement. This Agreement shall terminate upon fifteen (15) days notice to the FBI and the DOJ if no covered XO entity is a Domestic Communications Company.

8.14 Suspension of Agreement With Respect to a Domestic Communications Company. This Agreement shall be suspended upon thirty (30) days notice to the FBI and DOJ with respect to any covered XO entity if said entity is no longer a Domestic Communications Company.

8.15 Suspension of Agreement If No Foreign Ownership. This Agreement shall be suspended in its entirety with respect to XO and all Domestic Communications Companies thirty (30) days after receipt from XO of notice and documentation reasonably satisfactory to the DOJ and FBI that neither Telmex nor any other foreign entity neither Controls XO or a Domestic Communications Company nor holds, directly or indirectly, a ten (10) percent or greater interest in XO or a Domestic Communications Company, unless the DOJ and FBI notify XO within said thirty (30) day period that this Agreement shall not be suspended in order to protect U.S. national

security, law enforcement, and public safety concerns. If this Agreement is not suspended pursuant to this provision, the DOJ and the FBI agree to consider promptly and in good faith possible modifications to this Agreement. Notwithstanding anything to the contrary in this Section 8.15, this Agreement shall remain in effect with respect to XO and the Domestic Communications Companies for so long as (and the obligations of XO and the Domestic Communications Companies shall not be suspended and any suspension of the obligations of XO and the Domestic Communications Companies shall terminate if) Telmex or any other foreign entity shall either Control or hold, at any time does hold, or is a party to an agreement to hold, directly or indirectly, a ten (10) percent or greater ownership interest in XO or any Domestic Communications Company or any transferee or assignee of the FCC licenses or authorizations held by XO or a Domestic Communications Company.

8.16 Effectiveness of Article 8. This Article 8, and the obligations imposed and rights conferred herein, shall be effective upon the execution of this Agreement by all the Parties.

This Agreement is executed on behalf of the Parties:

XO Communications, Inc.

Date: September 5, 2002

By: _____
Printed Name: R. Gerald Salemme
Title: Senior Vice President, External Affairs

Federal Bureau of Investigation

Date: _____

By: _____
Printed Name: Kenneth L. Wainstein
Title: General Counsel

United States Department of Justice

Date: _____

By: _____
Printed Name:
Title: Deputy Attorney General

This Agreement is executed on behalf of the Parties:

XO Communications, Inc.

Date:_____

By:_____
Printed Name: R. Gerald Salemme
Title: Senior Vice President, External Affairs

Federal Bureau of Investigation

Date:_____

By:_____
Printed Name: Kenneth L. Wainstein
Title: General Counsel

United States Department of Justice

Date: 9-16-02

By: John C Keeney, acting AAG, Criminal
Printed Name:
Title: Deputy Attorney General pursuant to delegated authority

This Agreement is executed on behalf of the Parties:

XO Communications, Inc.

Date:_____

By:_____
Printed Name:
Title:

Federal Bureau of Investigation

Date: September 10, 2002

By: /Kenneth L. Wainstein/
Printed Name: Kenneth L. Wainstein
Title: General Counsel

United States Department of Justice

Date:_____

By:_____
Printed Name: John G. Malcolm
Title: Deputy Assistant Attorney General

EXHIBIT A

CONDITION TO FCC AUTHORIZATION

IT IS FURTHER ORDERED, that the authorization and any licenses transferred thereunder are subject to compliance with the provisions of the Agreement attached hereto between XO on the one hand, and the Department of Justice (the "DOJ") and the Federal Bureau of Investigation (the "FBI") on the other, dated SEPTEMBER 16, 2002, which Agreement is designed to address national security, law enforcement, and public safety issues of the FBI and the DOJ regarding the authority granted herein. Nothing in this Agreement is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, 47 U.S.C. § 222(a) and (c)(1) and the FCC's implementing regulations.